161 U. S. 475

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

161-475

OCTOBER TERM, 1895.

No. 794.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

SAMUEL ZUCKER AND WILLIAM JOSEPHY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED NOVEMBER 7, 1895.

(16084)

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a UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the district court of the United States for the southern district of New York, greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea, which is in the said district court before you, between The United States of America, plaintiffs, and Samuel Zucker and William Josephy, defendants, a manifest error hath happened to the great damage of the said United States of America, as by their complaint appear . We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the part aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the 20th day of November, eighteen hundred and ninety-five, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 31st day of October, in the year of our Lord one thousand eight hundred and ninety-five.

SAM'L H. LYMAN,
Clerk.

The foregoing writ is hereby allowed.

ADDISON BROWN.

b UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Samuel H. Lyman, clerk of the district court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from 1 to , inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of The United States of America, plaintiff in error, against Samuel Zucker and William Josephy, defendants in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York, in the second circuit, this 31st day of October, in the year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the United States the one hundred and twentieth.

[SEAL.] SAM'L H. LYMAN,
Clerk.

(Indorsement:) U. S. Supreme Court. The United States of America, plaintiffs in error, against Samuel Zucker and William Josephy, defendants in error. Writ of error. Wallace Macfarlane, attorney for plaintiffs in error. Due service of a copy of the within writ of error is hereby admitted this 31st day of October, 1895. Kellogg, Rose & Smith, attorney' for defendant' in error.

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1 United States district court for the southern district of New York.

THE UNITED STATES OF AMERICA
against
SAMUEL ZUCKER AND WILLIAM JOSEPHY.

To the above-named defendants and each of them:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the United States attorney for said district within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness the Honorable Addison Brown, judge of the district court of the United States for the southern district of New York, at the city of New York, this sixth day of October, in the year one thousand eight hundred and ninety-three.

[SEAL.]

SAM'L H. LYMAN, *Clerk.*
EDWARD MITCHELL,
United States Attorney.

(Office and post-office address: U. S. Court and Post-Office Building, Broadway and Park Row, New York.)

(Indorsement:) United States district court, southern district of New York. The United States of America vs. Samuel Zucker and William Josephy, summons. Edward Mitchell, United States attorney. Filed Oct. 9, 1893.

2 Fol. 1 District court of the United States of America for the southern district of New York.

THE UNITED STATES OF AMERICA, PLAINTIFFS,
against
SAMUEL ZUCKER AND WILLIAM JOSEPHY, DEFENDANTS.

The plaintiffs above-named, by Edward Mitchell, their attorney for the southern district of New York, complaining of the defendants, allege on information and belief:

Fol. 2 For a cause of action.

That the defendants were at the time and times hereinafter set forth copartners, doing business at the city of New York under the firm name of Zucker & Josephy, and that the said defendants are inhabitants of the southern district of New York.

That on or about the 14th day of December, in the year one thousand eight hundred and ninety-one, certain goods, wares, and merchandise, to wit:

4 cases artificial flowers, viz: C 837 L 424.
" 838 " 424.
" 839 " 424.
" 844 " 472–424.

Fol. 3 were imported and brought into the United States, to wit, into the port of New York, in the collection district of the city of New York, from Paris, a foreign port or place by way of ———, in a ship or vessel called the "La Bourgoyne," and were, when so imported, 3 subject to the payment of duties to the United States.

That afterwards, to wit, on the 14th day of December, in the year one thousand eight hundred and ninety-one, at the office of the collector of the said district, an entry in writing of the said goods, Fol. 4 wares, and merchandise, purporting to be duly signed, was made with the said collector by the defendants, the owners, importers, and consignees thereof, and a duly certified invoice thereof there was then and there produced before the collector or his deputies, purporting to show the actual cost of said merchandise purchased, together with a declaration accompanying said invoice and entry, which entry and declaration were thereupon then and there signed and verified in manner and form as required by law.

That the said goods, wares, and merchandise of which said Fol. 5 entry was made, and an invoice produced as aforesaid, were obtained by purchase, were then and there subject to the payment of duty, and were then and there entered as aforesaid by the said defendants as the owners, importers, and consignees thereof, by means of the said entry, invoice, affidavit, letter, and paper, which were false and fraudulent in this, that said invoice did not contain a true statement of the actual cost of said goods, wares, and merchandise, and that the actual cost of said goods, wares, and merchandise was greater than the amount stated therein as the actual cost thereof, as defendants well knew, and by means of written statements, which were then and there false, in this, that in said declaration the said defendants, owners, and consigness, as aforesaid, stated that the invoice of said goods, wares, and merchandise, 4 Fol. 6 produced as aforesaid, and the declaration therein, were in all respects true, when in truth and fact they were false in each and every particular, as defendants well knew, who were guilty of the following willful act, to wit, that said defendants willfully and wrongfully concealed and suppressed the actual cost of said goods, wares, and merchandise, in said invoice produced to said collector, as aforesaid, and that by means of the premises the United States has been deprived of the lawful duties, or a portion thereof, accruing upon the said merchandise, and that the said frauds and false statements, and papers, acts, and omissions, relate to the whole of the merchandise imported as aforesaid.

Fol. 7 That on or about the 14th day of December, 1891, the said defendants, the owners, importers, consignees, or agents of the said merchandise, made an entry as aforesaid of said merchandise, which was then and there obtained by purchase and was subject to duties, and had been imported into the United States within said district of the city of New York from Paris, a foreign port or place, by way of ———, in the ship or vessel "La Bourgoyne," by means of a fraudulent and false invoice, affidavit, letter, and paper, and by means of certain false statements, written and verbal, and by means of certain other false and fraudulent practices and appliances, and has been guilty of certain willful acts and omissions, by means Fol. 8 whereof the United States have been deprived of the lawful duties or a portion thereof accruing upon the said goods,

wares, and merchandise, or a portion thereof, embraced and referred to in such invoice, affidavit, letter, paper, and statement and affected by such acts and omissions.

Whereby and by force of the statute of the United States in such case made and provided, to wit, the ninth section of the act of Congress, approved June 10th, 1890, the value of the merchandise herein-
5 before referred to, to be recovered from the said defendants, being the whole of the merchandise contained in the cases and packages containing the particular article and articles of merchandise to which such fraud and false paper and statement related, became and is forfeited to the United States.

That the value of the said merchandise was $346.02.

And thereupon, and by reason of all and singular the premises the said attorney for the United States, on behalf of the United States, demands judgment against said defendant for the sum of said value so forfeited, to wit: Three hundred and forty-six and $\frac{02}{100}$ dollars together with interest from the date of entry and the costs of this action.

EDWARD MITCHELL,
U. S. Attorney.

6 (Indorsement:) U. S. district court southern district of New York. United States versus Samuel Zucker & al. Complaint. Edward Mitchell, United States attorney, attorney for plaintiff. Due service of a copy of the within complaint is hereby admitted. Kellogg, Rose & Smith, attorneys for defendants. Filed Oct. 9, 1893.

7 United States district court, southern district of New York.

THE UNITED STATES OF AMERICA
against
SAMUEL ZUCKER AND WILLIAM JOSEPHY.

The above-named defendants for their answer to the complaint of the plaintiff herein.

First. They admit that at the times mentioned in said complaint the defendants were and now are copartners under the firm name of Zucker & Josephy, and that the defendants are inhabitants of the southern district of New York, as stated and alleged in the "said cause of action of" said complaint.

Second. They admit that on or about the time set forth in the said complaint certain goods, wares, and merchandise were imported and b'ought into the United States, to wit, into the port of New York, in the collection district of New York; that they have no knowledge or information sufficient to form a belief as to whether the complaint correctly sets forth the quantities and kinds of goods so imported at such times, or the place from which the same was brought or shipped, or the vessel by which the same was brought into the United States, and they therefore deny the allegations of said complaint in that behalf.

Third. And defendants, further answering, deny each and every other allegation contained in said complaint.

8 Fourth. Defendants, for a separate and distinct answer to the said complaint, allege that the value of the goods in the said

"cause of action" mentioned did not, nor did any part thereof, become forfeited in manner or form as in said complaint in that behalf alleged.

Fifth. Defendants, for a further separate and distinct answer to the said complaint, allege that this action is not brought against the person making the entry of the goods, wares, and merchandise "in said" complaint specified, and therefore the plaintiff is not entitled to maintain this action.

Sixth. Defendants, for further answer to said complaint, allege that the duties on any and all goods, wares, and merchandise imported by the defendants during the times specified in said complaint had been liquidated and paid by the defendants, and said goods, wares, and merchandise delivered to the defendants as owners thereof, all without fraud, and that more than one year has elapsed since the time of the entry of such goods, wares, and merchandise, and that the plaintiff has no right to have and ought not to maintain any action to recover the value thereof, and that the same is barred, as by the statutes of the United States in that behalf made and provided.

KELLOGG, ROSE & SMITH,
Attorneys for Defendants.

9 Due and timely service of a copy of within answer is hereby admitted.

EDWARD MITCHELL,
U. S. Atty.

(Indorsement:) U. S. district court, southern district of New York. The United States of America versus Samuel Zucker and o'rs. Answer. Kellogg, Rose & Smith, attys. for defts., 120 Broadway. Filed Nov. 22, 1893.

10 United States district court, southern district of New York.

UNITED STATES OF AMERICA
against
SAMUEL ZUCKER AND WILLIAM JOSEPHY. } Postea.

This action having been brought to trial at a stated term of this court held on the 31st day of Oct., 1895, before Hon. Addison Brown, district judge, and a jury, and the same having been tried and the jury, under direction of the court, having rendered a verdict in favor of the defendants and against the plaintiffs,

It is, on motion of Kellogg, Rose and Smith, attorneys for the defendants,

Ordered and adjudged, That the complaint in this action be, and the same is hereby, dismissed, and that the defendants, Samuel Zucker and William Josephy, have judgment against the United States herein.

ADDISON BROWN.

10a (Indorsed:) U. S. district court, S. D. of New York. United States versus Samuel Zucker and *and* judgment for defendants. Kellogg, Rose & Smith, attys. for defts. Due service of a copy of the within postea is hereby admitted. Wallace Macfarlane, U. S. atty. & atty. for pl'ffs. Filed Oct. 31, 1895.

10b United States district court, southern district of New York.

UNITED STATES OF AMERICA
against
SAMUEL ZUCKER AND WILLIAM JOSEPHY.

Plaintiffs and appe'ants' bill of exceptions.

Afterwards, to wit, on the 31st day of October, 1895, at a stated term of this court the above-entitled case came on for trial before the Hon. Addison Brown, district judge, and a jury.

Wallace Macfarlane, esq., United States attorney, and James R. Ely, esq., assistant United States attorney, appeared for the plaintiffs, and Abram J. Rose, esq., appeared for the defendants.

After duly opening the case counsel for the plaintiffs, among other things to sustain the issues on the part of the plaintiffs, offered to read in evidence on behalf of the plaintiffs the deposition of George De Bray, of Paris, in the Republic of France, heretofore duly taken and properly authenticated and certified under letters rogatory duly issued and returned herein.

Defendant's counsel objected to the admission of this testimony upon the following grounds:

1. That this action, though civil in form, is in substance a criminal case, and the defendants by the provisions of the Constitution of the
11 United States and by the principles of the decision of the Supreme Court in the case of Boyd vs. United States (116 U. S., 616), are entitled on the trial of this action to be confronted with the witnesses against them.

2. That the constitutional right of the defendants to be confronted with the witnesses against them is not secured by giving them notice of the execution of letters rogatory in France, and that their failure to attend on such execution at a place 3,000 miles from the place of trial out of the district and in a foreign country does not operate as a waiver of their constitutional right, if it can be waived.

The COURT. Is any objection made to the admission of this testimony on the ground of its materiality?

Mr. ROSE. No, your honor; we admit that it is material, and we object to its admission simply upon the grounds above stated.

The COURT. Objection sustained and evidence excluded.

Plaintiffs' counsel thereupon duly excepted to such ruling.

Plaintiffs having rested their case, defendants' counsel moved that the court direct the jury to find a verdict for the defendants.

Motion granted, and by direction of the court the jury found a verdict for the defendants.

Plaintiffs' counsel duly excepted.

Whereas the exceptions, matters, and things aforesaid would not appear by the record, I have settled, allowed, and signed this bill of exceptions on the prayer of the said plaintiffs by their counsel.

ADDISON BROWN.

Foregoing bill of exceptions agreed to as correct.

WALLACE MACFARLANE,
U. S. Attorney and Attorney for Plaintiffs.
KELLOGG, ROSE & SMITH,
Attys. for Defts.

12 (Indorsement:) U. S. district court, southern district of New York. United States versus Samuel Zucker et al. Plaintiffs and appellants' bill of exceptions. Wallace Macfarlane, United States attorney, attorney for plaintiff. ——— ———, attorney for defendant. Filed Oct. 31, 1893.

13 United States district court, southern district of New York.

THE UNITED STATES OF AMERICA against SAMUEL ZUCKER AND WILLIAM JOSEPHY. } Of October term, in the year of our Lord one thousand eight hundred and ninety-five.

Afterwards, to wit, on the 31st day of October, in this same term, before the judge of the United States district court for the southern district of New York, at the United States court and post-office building in the city of New York, come the said plaintiffs in error, by their attorney, Wallace Macfarlane, esq., United States attorney for the southern district of New York, and say that in the record and proceedings aforesaid there is manifest error in this, to wit:

First. The court erred in excluding the deposition offered on behalf of the plaintiffs in error of George De Bray, of Paris, in the Republic of France, duly taken and properly authenticated and certified under letters rogatory duly issued and returned herein.

Second. The court erred in directing the jury herein to find a verdict for the defendants.

Third. And the court erred also in this, that by the record it appears that the judgment aforesaid given was given for the said defendants in error against the said plaintiffs in error, whereas by the law of the land the said judgment ought not to have been given for the said defend-

14 ants in error; and the said plaintiffs in error therefore pray that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that they may be restored to all things which they have lost by occasion of the said judgment.

WALLACE MACFARLANE,
United States Attorney, Southern District of New York.

15 (Indorsement:) U. S. district court, southern district of New York. The United States of America versus Samuel Zucker & al. Assignment of errors. Wallace Macfarlane, United States attorney, attorney for plaintiffs. Due service of a copy of the within is hereby admitted. Kellogg, Rose & Smith, attorneys for defe'nt. Filed Oct. 31, 1895.

16 UNITED STATES OF AMERICA, *ss:*

To Samuel Zucker and William Josephy, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the 20th day of November, eighteen hundred and ninety-five, pursuant to a writ of error filed in the clerk's office of the district court of the United

States for the southern district of New York, wherein the United States of America, plaintiff in error, and you are defendant' in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated October 31st, 1895.

ADDISON BROWN.

17 (Indorsement:) U. S. Supreme Court. The United States of America, plaintiffs in error, against Samuel Zucker and William Josephy, defendants in error. Citation. Wallace Macfarlane, U. S. attorney and attorney for plaintiffs in error. Due service of a copy of the within citation is hereby admitted this 31st day of Oct., 1895. Kellogg, Rose & Smith, attorneys for defendants in error. Filed Oct. 31, 1895.

(Indorsement on cover:) Case No. 16084. Term No., 794. The United States, plaintiff in error, vs. Samuel Zucker and William Josephy. S. New York, D. C. U. S. Filed November 7th, 1895.

States for the southern district of New York, wherein the United States of America, plaintiff in error, and you are defendant' in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated October 31st, 1895.

ADDISON BROWN.

17 (Indorsement:) U. S. Supreme Court. The United States of America, plaintiffs in error, against Samuel Zucker and William Josephy, defendants in error. Citation. Wallace Macfarlane, U. S. attorney and attorney for plaintiffs in error. Due service of a copy of the within citation is hereby admitted this 31st day of Oct., 1895. Kellogg, Rose & Smith, attorneys for defendants in error. Filed Oct. 31, 1895.

(Indorsement on cover:) Case No. 16084. Term No., 794. The United States, plaintiff in error, vs. Samuel Zucker and William Josephy. S. New York, D. C. U. S. Filed November 7th, 1895.

Office Supreme Court U. S.
FILED.
NOV 18 1895
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

THE UNITED STATES, PLAINTIFF in error,
v.
SAMUEL ZUCKER ET AL. } No. 794.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

THE UNITED STATES, PLAINTIFF in error, v. SAMUEL ZUCKER ET AL. } No. 794.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO ADVANCE.

This was an action brought to recover the value of certain merchandise forfeited to the United States under the provisions of section 9 of the customs administrative act of June 10, 1890, ch. 407. (Rev. Stat. Supp., p. 749.)

It was tried before Judge Addison Brown and a jury and a verdict directed for the defendants. The question involved upon this writ of error is whether an action for a forfeiture under said section, "though civil in form, is in substance a criminal case, and the defendants, by the provisions of the Constitution of the United States and

by the principles of the decision of the Supreme Court in the case of *Boyd* v. *United States* (116 U. S., 616), are entitled on the trial of this action to be confronted with the witnesses against them."

In this, as in many other actions of the same nature, it is impossible to prove the facts alleged in the declaration or complaint, if it be necessary to confront the defendants upon the trial with the witnesses against them, the necessary witnesses being in foreign countries and their personal attendance unobtainable. Many cases involving a large amount of money depend upon the decision of the court on this writ of error. The Secretary of the Treasury has requested that a hearing be obtained at as early a date as possible, since, under the decision of the trial court, the revenue laws of the United States can not in this particular be enforced. The Solicitor-General therefore respectfully moves this court for an advancement of the present cause, and that it be set for hearing at an early day.

HOLMES CONRAD,
Solicitor-General.

Office Supreme Court, U. S.
FILED.
JAN 7 1896
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
SAMUEL ZUCKER ET AL. } No. 794.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR PLAINTIFF IN ERROR.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
SAMUEL ZUCKER ET AL. } No. 794.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR PLAINTIFF IN ERROR.

This was an ordinary civil action, brought according to the provisions of the Code of Civil Procedure of the State of New York, to recover the sum of $346.02, being the value of merchandise alleged to have been forfeited by the defendants upon importation of the same by reason of fraudulent undervaluation in the invoice and entry, under the Customs Administrative Act of June 10, 1890, ch. 407, § 9, which section is as follows:

> That if any owner, importer, consignee, agent, or other person shall make or attempt to make any entry of imported merchandise by means of any fraudulent or false invoice, affidavit, letter, paper,

> or by means of any false statement, written or verbal, or by means of any false or fraudulent practice or appliance whatsoever, or shall be guilty of any willful act or omission by means whereof the United States shall be deprived of the lawful duties, or any portion thereof, accruing upon the merchandise, or any portion thereof, embraced or referred to in such invoice, affidavit, letter, paper, or statement, or affected by such act or omission, *such merchandise, or the value thereof, to be recovered from the person making the entry, shall be forfeited,* which forfeiture shall only apply to the whole of the merchandise or the value thereof in the case or package containing the particular article or articles of merchandise to which such fraud or false paper or statement relates; and such person shall, upon conviction, be fined for each offense a sum not exceeding five thousand dollars, or be imprisoned for a time not exceeding two years, or both, in the discretion of the court.

The importations were made December 14, 1891. The complaint was filed October 9, 1893. The action was brought to trial October 31, 1895, before Hon. Addison Brown, district judge of the southern district of New York, and a jury.

The district attorney offered to read in evidence a deposition duly taken and properly authenticated and certified under letters rogatory duly issued and returned herein. The deposition was taken in Paris. Its materiality was conceded. The sole objection was that testimony can not be taken upon letters rogatory in an action to recover forfeiture, because—

> This action, though civil in form, is in substance a criminal case, and the defendants, by the

> provisions of the Constitution of the United States, and by the principles of the decision of the Supreme Court in the case of *Boyd* v. *United States* (116 U. S., 616), are entitled on the trial of this action to be confronted with the witnesses against them.

The objection was sustained by the court, and the district attorney excepted. A verdict was then found in favor of the defendant by direction of the court, to which the district attorney also excepted.

ASSIGNMENT OF ERROR.

The ruling assigned for error, and which will here be pressed upon the court, is the exclusion of the testimony taken under the letters rogatory. It having been expressly admitted that this evidence was material, it is to be presumed that its admission would have enabled the case at least to go to the jury. When error is shown the presumption is that the plaintiff in error was prejudiced. (*Mexia* v. *Oliver*, 148 U. S., 664, 673, and cas. cit.; *Vicksburg R. R.* v. *O'Brien*, 119 U. S., 99, 103.)

CONSTITUTIONAL PROVISIONS.

The constitutional provision upon which the court all concurred in *Boyd* v. *United States*, *supra*, was that portion of the Fifth Amendment which is italicized as follows:

> *No person shall* be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public

> danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall *be compelled in any criminal case to be a witness against himself*, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

A civil action under a provision of the Anti-Moiety Act of June 22, 1874, nearly similar to that upon which the present suit is based, having been held to be a "criminal case" within the meaning of the Fifth Amendment, the learned judge upon the trial of the present case extended the principle so as to classify this action as a "criminal prosecution" under the Sixth Amendment, which is as follows:

> In all criminal *prosecutions* the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; *to be confronted with the witnesses against him;* to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

It will be noticed that if the decision below be affirmed, defendants in suits for penalties and forfeitures must be sued in the district wherein their offenses shall have been committed, instead of the district where they reside or where the goods may be seized.

It will be respectfully submitted, however, that the decision was erroneous for various reasons.

ARGUMENT

I.

This is an action brought to secure possession of moneys already belonging to the United States.

Some of the leading cases upon this point are referred to by Mr. Justice Gray in *United States* v. *Stowell* (133, U. S., 1, 17). Those arising under the internal-revenue laws, such as *Henderson's Distilled Spirits* (14 Wall., 44, 57) and *Thacher's Distilled Spirits* (103 U. S., 679), are familiar.

The principles which have been fixed by past decisions of this court may be stated as follows: The words "shall be forfeited" in a statute import a present forfeiture or transmission of title to the United States, taking place at the moment when the wrongful act which causes the forfeiture is committed; although, of course, judicial proceedings are necessary for the purpose of perfecting the Government's title to the forfeited property. Hence, if a statute provides that property "shall be forfeited," a subsequent *bona fide* purchaser without notice of the forfeiture takes no title to the property, and it may be recovered from him by the United States. If, however, as in the section now under consideration, a right of election is given to the United States, and the property or its value is forfeited, then, while a present right does at once vest in the United States, it does not attach to the goods until the United States elects to proceed against the goods instead of proceeding for the value. Consequently, if the goods reach the hands of a *bona fide* pur-

chaser without notice before the election is made, the United States is obliged to sue for the value; but the suit is none the less brought to recover Government property.

The language of the act of 1890 is not novel. It dates from the Collection Act of July 31, 1789, ch. 5, § 22 (1 Stat., 42). The language of the revised Collection Act of August 4, 1790, ch. 35, § 46 (1 Stat., 169), which was copied into the famous Collection Act of March 2, 1799, ch. 2, § 66 (1 Stat., 677), and thus remained the law for nearly a century, is as follows:

> That if any goods, wares, or merchandise, of which entry shall have been made in the office of a collector, shall not be invoiced according to the actual cost thereof at the place of exportation, with design to evade the duties thereupon, or any part thereof, *all such goods, wares, or merchandise, or the value thereof, to be recovered of the person making entry, shall be forfeited.*

This language was substantially repeated in Rev. St., § 2839.

The first case upon this general subject was *United States* v. *Grundy* (3 Cr., 338), decided in 1806. The Shipping Act of December 31, 1792, ch. 1, § 4 (1 Stat., 289), provided that for false registry "there shall be a forfeiture of the ship or vessel * * * or of the value thereof, to be recovered with costs of suit of the person by whom such oath or affirmation shall have been made." This, it will be noticed, presented the present case of an alternative forfeiture. The United States sued the assignees in bankruptcy of the person who falsely registered the vessel. The action was in form to recover

money received by them upon a sale of the vessel made by them as such assignees. The question argued was "whether by virtue of this act the absolute property in the ship or vessel vests in the United States either in fact or in contemplation of law on the taking of the false oath, or remains in the owners until the United States shall perform some act manifesting their election to take the ship and not the value." Chief Justice Marshall said that in case of a common-law forfeiture "nothing vests in the Government until some legal step shall be taken for the assertion of its right;" but that in the case of statutory forfeitures, the question would depend upon the language of the statute. The words of the present statute "certainly indicate that an alternative is presented to the United States." A special action could be brought against the person making the false oath, even while the vessel itself was within the reach of the Government. Moreover, this person might be only a part owner of the vessel, so that there are "distinct forfeitures claimed from different persons." Hence, "the real principle under which an action for the value can be maintained would seem to be that the ship itself did not belong to the United States in consequence of the false oath, but in consequence of the election to take the ship," etc. Hence, the court held that the right of the United States upon the commission of a wrongful act was a right to elect, and that it acquired no property in the vessel until the election was made. The action was therefore dismissed; for it could not be sustained as an action to recover the value of the vessel, because the defendant was not the person who took the oath.

The next case was *United States* v. *1,960 Bags of Coffee* (8 Cr., 398). This case arose under the Non-Intercourse Act of March 1, 1809, ch. 24, § 5 (2 Stat., 529), providing that any article imported in violation of the act "shall be forfeited; and the owner thereof shall moreover forfeit and pay treble the value of such articles." This was a libel based upon a seizure of forfeited articles. It was very elaborately argued, and held for a long time under consideration. One defense was that claimants were purchasers for valuable consideration. The United States demurred to this defense. Their demurrer was overruled, and the coffee restored; but the Supreme Court reversed the judgment, holding that the words "shall be forfeited" amounted to an express declaration "that the forfeiture shall take place upon the commission of the offense."

This case was followed without full discussion in *The Mars* (8 Cr., 417). This decision reversed a decree granted by Mr. Justice Story at circuit; and his opinion, thus overruled, is incorporated at length in his dissenting opinion in the former case. (8 Cr., 406–416.)

The next case is *Gelston* v. *Hoyt* (3 Wheat., 246), decided under the Neutrality Act of June 5, 1794, ch. 50, § 3 (1 Stat., 383). For certain offenses that act imposed a fine and imprisonment upon the person offending, and further declared that an offending vessel "shall be forfeited, one-half to the use of any person who shall give information of the offense, and the other half to the use of the United States." Mr. Justice Story, citing the two cases last mentioned, says that "the forfeiture must

be deemed to attach at the moment of the commission of the offense. * * * This is the doctrine of the English courts, and it has been recognized and enforced in this court upon very solemn argument" (p. 311).

In *Wood* v. *United States* (16 Pet., 342), section 66 of the Collection Act of 1799 was under consideration, and Mr. Justice Story, delivering the opinion of the court, remarked that "the forfeiture attaches immediately upon such an entry, upon such invoices, with such intent" (p. 362). The learned justice further remarked that "the forfeiture immediately attaches to every entry of goods falsely and fraudulently invoiced, without any reference whatever to the mode or the circumstances under or by which it is ascertained" (p. 365).

In *Caldwell* v. *United States* (8 How., 366), which was an information against certain cloth seized under the act of 1799, the remarks of Mr. Justice Story in the case last cited were considered at length. Claimants defended as *bona fide* purchasers, and the circuit judge had instructed the jury that this constituted no defense, relying upon the Wood case. Mr. Justice Wayne remarked (pp. 379–380):

> It can not be correctly said * * * that when this court said in Wood's case, speaking of the sixty-sixth section, that "forfeiture immediately attaches to every entry of goods falsely and fraudently invoiced" it was not intended to embrace either or both penalties between which the United States might make its election for the punishment of the fraud. That such is the meaning of the sentence already cited from Wood's case is shown by the court's recognition in the next of the alternative forfeiture of the value of

> the goods to be recovered of the person making the false entry. * * * The point in discussion in that part of the opinion was whether the sixty-sixth section of the act of 1799, ch. 22, had been repealed, or whether it was in full force. The court, arguing against the repeal, used the alternative forfeiture in it of the value of the goods and the want of the same in other acts to show that it was still in full force, in that way satisfactorily establishing that the words "the forfeiture immediately attaches to every entry of goods falsely and fraudulently invoiced" apply to the entry, not to make the goods a vested forfeiture in the United States, *but to show that the right in the United States to either forfeiture is coexistent with the commission of the fraud.*

The learned judge refers to the Grundy case as in point here; and it is believed that the principles laid down in the above cases have since remained unchanged.

Hence, in *Stockwell* v. *United States* (13 Wall., 531, 546), which was an action of debt brought under the act of March 3, 1823, ch. 58, § 2 (3 Stat., 781), against a person who had knowingly concealed imported goods liable to seizure, and thus become liable to "forfeit and pay a sum double the amount or value of the goods," Mr. Justice Strong, delivering the opinion of the majority of the court, said:

> Now, it is against interference with the right of the Government to seize and appropriate to its own use property illegally imported that the statute of 1823 was aimed. It was to secure indemnity for a wrong to rights of property. The instant that goods are illegally imported, the instant that they pass through the custom-house without the payment of

duties, the right of the Government to seize and appropriate them becomes perfect.

The Stockwell case has been partially overruled (*United States* v. *Claflin*, 97 U. S., 546, 550), but not upon this point.

II.

This is a civil and not a criminal action.

It will be remembered that while the Fifth Amendment applies to a criminal *case*, the Sixth Amendment applies only to a criminal *prosecution*. The Congress which made these amendments recognized a distinction which, as we respectfully submit, was overlooked by the learned district judge: namely, the distinction between the cause of action and the remedy. An action to enforce a forfeiture, simple or alternative, may have no criminal element at all (*Miller* v. *United States*, 11 Wall., 268). When based upon a violation of law by the owner of the forfeited goods or his representative, it is no doubt largely penal, though also remedial (*Taylor* v. *United States*, 3 How., 197, 210, and auth. cit.; *United States* v. *Stowell*, 133 U. S., 1, 12), in nature. Nothing is better settled, however, than that it is a civil and not a criminal action. (*United States* v. *La Vengeance*, 3 Dall., 297; *Anonymous*, 1 Gall., 22; *The Palmyra*, 12 Wheat., 1; *Snyder* v. *United States*, 112 U. S., 216; *Friedenstein* v. *United States*, 125 U. S., 224, 231; *Origet* v. *United States*, 125 U. S., 240, 245.) This is indicated by the word "recovered" in the statute (*Stockwell* v. *United States*, 13 Wall., 531, 542).

It will be remembered that the word "penal" has "different shades of meaning." (*Huntington* v. *Attrill*, 146

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It will be remembered that the word "penal" has "different shades of meaning." (*Huntington* v. *Attrill*, 146

U. S., 657, 666–667.) The distinction here referred to is discussed at length by Mr. Justice Brewer in *State of Iowa* v. *Chicago, Burlington and Quincy Ry. Co.* (37 Fed. Rep., 497). That was an action brought by the State against the railway company to recover a penalty of not less than $1,000 nor more than $5,000 for the crime of extortion. The railroad company filed a petition for removal to the United States circuit court, claiming that the action, being in form and by the express permission of the statute a civil *action*, was an action "of a civil *nature*" within the meaning of the removal act of March 3, 1887, ch. 373, § 2. The court stated the question as follows (p. 498):

> But while the form is civil, is it of a civil or criminal nature? For obviously not the form, but the nature, of the action, determines the question.

The dictionaries and other authorities are examined at length, and it is shown that while some actions are of a civil and others of a criminal nature, some contain elements of both. The act then under consideration, as the court's analysis clearly showed, was purely criminal in nature, and the court say (p. 502):

> If Congress had intended that the mere form of the action determined the right of removal, apt language would have been "actions civil in form," *or perhaps the more general expression*, "*civil actions;*" but when the language is "of a civil *nature*," it discloses an intent, as affirmed by the cases of *Ames* v. *Kansas* (111 U. S., 460) and *State* v. *Railroad Co.* (33 Fed. Rep., 726) that the court should always look beyond the matter of form to the purpose, object, nature of the action.

Yet, while that action was purely penal in nature, and was in no aspect, like the case at the bar, a suit to recover property, nevertheless it was a civil action, and had it been brought originally in the United States circuit court, could have come up to this court upon writ of error under the old practice. Thus, in *United States* v. *Emholt*, 105 U. S., 414, an information for forfeiture of the right, title and interest of a certain distiller in distillery property, Mr. Justice Gray, *arguendo*, said:

> If it is to be considered as a civil action, the proper mode of bringing it up is by writ of error, and not by appeal. * * * If, according to *Clifton* v. *United States* (4 How., 242, 250), it should be treated as in the nature of a criminal proceeding, it is hard to see how it could be brought to this court at all except upon a certificate of division of opinion.

The Boyd case, upon which this defendant in error relies, could not have reached this court by writ of error had it not been, in the true sense of the term, a civil action, as distinguished from a criminal prosecution.

A large number of cases are cited by Mr. Justice Strong in *Stockwell* v. *United States*, *supra*, at page 543, to the effect that an action of debt will lie at the suit of the United States to recover the penalties and forfeitures imposed by statute, as expressly provided by the Collection Act of 1799, § 89. The learned judge remarked (p. 542):

> Whether the liability incurred is to be regarded as a penalty, or as liquidated damages for an injury done to the United States, it is a debt, and as such it must be recoverable in a civil action.

In fact, the action of debt was the ancient common-law method of collecting a penalty (3 Bacon's Abr. Bouvier's ed., p. 84; 13 Petersdorff's Abr., pp. 277, 281, and notes). The Exchequer Chamber held in 1780 that it was within the statute of Elizabeth allowing writs of error to that court in such actions. (*Lloyd* v. *Skutt*, 1 Doug., 350, 353.)

The passage in *Clifton* v. *United States* (4 How., 242, 250), referred to by Mr. Justice Gray, is the remark that in a forfeiture proceeding "one good count was sufficient to uphold a general verdict and judgment upon all the counts, though some of them might be bad, the information being regarded in the nature of a criminal proceeding." The Clifton case was a libel *in rem*, and the opinion recognized the fact that it did not in all respects partake of the nature of a criminal proceeding; for instance, it was not necessary to prove the crime beyond reasonable doubt (p. 248), and as above remarked it was reviewable upon writ of error.

United States v. *Claflin* (97 U. S., 546), was based upon a special form of certain statutory provisions which "contemplated a criminal proceeding and not a civil action of debt."

Certainly this action, brought to recover the value of property fraudulently entered, is no more criminal in nature than would have been the suit or action brought, had the United States so elected, for the purpose of obtaining possession of the goods themselves. (See *Boyd* v. *United States*, 116 U. S., 616, 637.) Yet so far from its being necessary to prove the case beyond reasonable

doubt, in the latter form of proceeding, it is expressly provided by the Customs Administrative Act that (§ 21):

> If the property is claimed by any person, the burden of proof shall lie upon such claimant: *Provided*, That probable cause is shown for such prosecution, to be judged of by the court.

This is an ancient provision; and although the facts upon criminal prosecutions must be proved beyond reasonable doubt, nevertheless the constitutionality of this provision regarding forfeitures seems never to have been questioned in this court. (*Locke* v. *United States*, 7 Cr., 339, 348; *60 Pipes of Brandy*, 10 Wheat., 421, 426; *American Fur Co.* v. *United States*, 2 Pet., 358, 363; *Wood* v. *United States*, 16 Pet., 342, 366; *Taylor* v. *United States*, 3 How., 197, 211; *Clifton* v. *United States*, *supra*; *Buckley* v. *United States*, 4 How., 251, 260; *Cliquot's Champagne*, 3 Wall., 114, 143, 199; *Averill* v. *Smith*, 17 Wall., 82, 92, 93; *199 Barrels of Whisky* v. *United States*, 94 U. S., 86, 89; *Stacey* v. *Emery*, 97 U. S., 642; *Lilienthal's Tobacco* v. *United States*, 97 U. S., 237, 265.) When first questioned, in any court, in 1894, it was sustained. (*United States* v. *A Lot of Jewelry*, 59 Fed. Rep., 684.)

To sustain a decree of forfeiture, if defendant fails to put in any evidence, it is not even necessary to make a *prima facie* case or to do anything further than prove "circumstances which will warrant suspicion." (*Locke* v. *United States*, *supra*.) Whether such a case is established is a question for the court (*Taylor* v. *United States*, *supra*), which directs a verdict if defendant puts in no evidence. (*United States* v. *A Lot of Jewelry*, 59 Fed. Rep.,

684.) The collector is protected from an action of trespass for such a seizure by the fact that he had a "doubt as to the true construction of the law." (*United States* v. *Riddle*, 5 Cr., 311.) It is competent for Congress to protect him from all liability, even if he acted altogether unreasonably. This was done by the Embargo Act and repeatedly sustained. (*Crowell* v. *McFadon*, 8 Cr., 94; *Otis* v. *Watkins*, 9 Cr., 339; *Otis* v. *Walter*, 2 Wheat., 18; 11 Wheat., 192.)

It has, indeed, been said by this court in a somewhat *obiter* way, in the absence of such a statute, that a forfeiture case must be proved beyond reasonable doubt. (*United States* v. *The Brig Burdett*, 9 Pet., 682, 691; and see *Chaffee* v. *United States*, 18 Wall., 516, 545; *Lilienthal's Tobacco* v. *United States*, 97 U. S., 237, 271.) The decisions in England and the various States are in conflict upon this point. They were reviewed in New York in the case of *People* v. *Briggs* (47 Hun, 266; 114 N. Y., 56, 64, 65).

It is unnecessary to consider these conflicting authorities. It is sufficient for present purposes to point out that whatever may be the rule at common law as to the sufficiency of evidence to establish a forfeiture, it is a proper subject for statutory regulation, even to the extent of making a *prima facie* case out of somebody's individual opinion. This shows that a forfeiture proceeding is not a criminal prosecution within the meaning of the Constitution, for it is certainly not due process of law to convict one of a crime, unless he is able affirmatively to establish his innocence, on proof that some subordinate

Government officer thought he was guilty of it. (See *State* v. *Kartz*, 13 R. I., 528; *State* v. *Wilson*, 15 R. I., 180; *People* v. *Cannon*, 139 N. Y., 32, 43, 48; *State* v. *Anderson*, 5 Wash., 350, 352.)

III.

Civil proceedings to enforce forfeitures or penalties have never been regarded as criminal prosecutions in actual practice, as to indictments or as to rules of evidence.

Prior to the Revolution there was no general common-law power to take depositions without consent in civil causes, except in India under an act of Parliament of 1773. When depositions were taken in civil causes, it was upon a forced consent, on motion for a continuance or otherwise. (See, for instance, cases cited in *Laragoity* v. *Attorney-General*, 2 Price, 172.) In criminal prosecutions, however, depositions had anciently been freely used against the prisoner, and their use had been stoutly resisted. (See early State Trials, abstracted in Stephen's History of the Criminal Law of England, Vol. I.) It seems to have become settled in England by 1695 that depositions, when admissible in criminal prosecutions, must have been taken in the prisoner's presence and with right to cross-examine. (*Rex* v. *Paine*, 5 Mod., 163; S. C. Comb., 358; and other authorities cited in *People* v. *Restell*, 3 Hill, 289, 300.) The provision for depositions *de bene esse* in our Judiciary Act of 1789 "has been said to be a novelty in legislation." (*United States* v. *Tilden*, 10 Ben., 566, 572.) This is a mistake.

(See, for instance, Laws of N. C., 1777, Nov. sess., ch. 2, §§ 39–42.) It is noticeable, however, that the Judiciary Act was framed by the same Congress which framed the Fourth, Fifth, and Sixth Amendments.

As bearing on the Fourth and Fifth Amendments, it will be remembered that this court in the Boyd case, at page 631, called attention to the qualifying clause in § 15 of the Judiciary Act, whereby the power of common-law courts to compel discovery of books and writings was confined to cases and circumstances where it would be compelled "by the ordinary rules of proceeding in chancery;" thus, as the court said, incorporating the "cardinal rule" of that court "never to decree a discovery which might tend to convict the party of a crime or to forfeit his property."

The provision as to taking depositions, in § 30 of the same act, contained no such qualifying words. It is very broad, applying to every "civil cause;" and it expressly appears that this term was intended to include forfeiture proceedings, there being a special clause as to notice—

> In causes of admiralty and maritime jurisdiction, *or other cases of seizure*, when a libel shall be filed in which an adverse party is not named.

It is a remarkable fact that the very first authority concerning letters rogatory in the Federal courts was the forfeiture case of *Nelson* v. *United States* (Peters C. C., 235), decided by Mr. Justice Washington in 1816. One of the first cases in this court on the use of depositions in general is the forfeiture case of *The Samuel* (1 Wheat., 9), decided also in 1816. Early authorities showing the use of depositions in penalty and forfeiture cases are suf-

ficiently plentiful. (*The Argo*, 2 Wheat., 287; *The London Packet*, 2 Wheat., 371; *United States* v. *One Case of Hair Pencils*, 1 Paine, 400; *United States* v. *Smith*, 4 Day, 121, 127.)

So far as they affect the constitutional question, the common-law and admiralty cases are equally in point. There is no distinction, from that point of view, between a proceeding *in rem* for a forfeiture and an action *in personam* to recover the value of the thing forfeited. They are both civil in form. So far as they are penal in nature, they are equally penal. (*Boyd* v. *United States*, 116 U. S., 616, 637; see also *The City of Norwich*, 118 U. S., 468, 503.)

As the constitutional provision under consideration originated in Virginia, it may be interesting to note that the procedure in that State to enforce custom-house forfeitures was by libel in admiralty (*Bentley* v. *Roan*, 4 Call, 153; *Fairclough* v. *Gatewood*, *id.*, 158; *Douglass* v. *Roan*, *id.*, 353), while an action of debt is there regarded as a proper means of recovering a penalty (*Sims* v. *Anderson*, 8 Leigh, 479). The same Convention which adopted the Bill of Rights in 1776 made special reference to penalties in the Constitution adopted at the same time. It also provided heavy penalties for refusing to receive paper money, and made them recoverable "by action of debt or information." (8 Hening's Statutes at Large, pp. 147, 148.)

Similar procedure was prescribed as to various penalties by the general assembly in October of that year, under Patrick Henry as governor. (*Id.*, pp. 157, 158, 186, 188, 189.)

The phraseology used in the Virginia Bill of Rights is that "in all capital or criminal prosecutions a man hath a right to * * * be confronted with the accusers and witnesses." (Art. VIII.) The Maryland Convention of the same year improved the form in its Declaration of Rights: "That in all criminal prosecutions a man hath a right to * * * be confronted with the witnesses against him" (Art. XIX), while it specially referred to penalties and forfeitures in its Constitution (Art. LVIII). The first general assembly of the State, in the following winter, under Governor Thomas Johnson (afterwards Mr. Justice Johnson), provided that "all fines, penalties, and forfeitures" of over £5 should be recovered "by indictment in the name of this State, or by action of debt in the name of this State, and of the informer," and that "no *prosecution or suit*" should be commenced after one year. (Laws of 1777, ch. 6.)

Still later in 1776, the North Carolina Congress adopted a Declaration of Rights, providing that "in all criminal prosecutions every man has a right to * * * confront the accusers and witnesses with other testimony." (Art. VII.) A statute of the following year, establishing the judicial system of the State, distinguishes between "suits on penal statutes," "pleas of the State," and "actions of debt other than on penal statutes." (Laws of 1777, November session, ch. 2, § 9.)

The Pennsylvania Declaration of Rights, adopted by a Convention which assembled July 15, 1776, provided that "in all prosecutions for criminal offenses a man hath a right to * * * be confronted with the wit-

nesses." (Art. IX.) Penalties for refusing to receive paper money were recoverable "in the manner prescribed and directed by the laws for recovery of debts not exceeding £5." (Act of January 29, 1777, ch. 4, § 13.)

The Delaware Declaration of Rights of 1776 provided that "in all criminal prosecutions the accused hath a right to * * * meet the witnesses in their examination face to face." (§ 7.) Penalties for refusal to receive paper money were recoverable "in the manner directed by the laws of this State for the recovery of debts not exceeding £5." (Laws of 1777, ch. IV b, § 5.)

A practice of this kind, dating from early times, is of great weight as a practical exposition of the Constitution. (*Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How., 272, 279–80; *The Laura*, 114 U. S., 411, 416; *Field* v. *Clark*, 143 U. S., 649, 691.)

A similar practical construction has been given to the first clause of the Fifth Amendment, which provides as follows: "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury," etc.

If this is a criminal prosecution, it is a prosecution for an infamous crime, since the court may, in its discretion, impose a sentence of two years' imprisonment. (*Ex parte Wilson*, 114 U. S., 417.) Earlier statutes *in pari materia* have also usually made the crime infamous, upon which the forfeiture was predicated. Yet it has never been claimed that the proceeding was a criminal prosecution,

even when commenced by information—a *quasi* criminal form of pleading, but, as Mr. Justice Story remarked, "common enough in civil prosecutions for fines and penalties." (2 Story on the Constitution, § 1786; *Ex parte Wilson*, *supra*, at p. 427.) In fact, it is believed that every such proceeding in the books will be found to have been commenced by information, when not purely in the form of a civil action. They were all in violation of the Constitution, if the judgment in the case at bar be not erroneous.

The practice having thus been uniform against defendant's contention, are we to regard it as a mere century of delusion? To so hold, the argument against it must be very strong and clear. (*McPherson* v. *Blacker*, 146 U. S., 1, 27.)

IV.

A criminal "case" is something much wider than a criminal "prosecution," and Boyd v. *United States is therefore not in point.*

In *Counselman* v. *Hitchcock* (142 U. S., 547, 563), Mr. Justice Blatchford said:

> A criminal prosecution under article 6 of the amendments is much narrower than a "criminal case" under article 5 of the amendments.

The word "case" has a very broad meaning, and applies to any form of proceeding which can be brought to the attention of a court (see 2 Story on the Constitution, § 1646; *Kendall* v. *United States*, 12 Pet., 524, 624; *Ex parte Milligan*, 4 Wall., 2, 112; *Blyew* v. *United*

States, 13 Wall., 581, 595; *Smith* v. *Adams*, 130 U. S., 167, 173; *Fong Yue Ting* v. *United States*, 149 U. S., 698, 728; *Interstate Commerce Commission* v. *Brimson*, 154 U. S., 447, 475) or court-martial (*In re Bogart*, 2 Sawy., 396, 404), or even before an executive officer. (*Counselman* v. *Hitchcock*, *supra*; *Caha* v. *United States*, 152 U. S., 211.)

The phrase as to being "confronted" comes from the Virginia Bill of Rights, drawn by George Mason and adopted June 12, 1776, by the Convention at Williamsburg. Its incorporation in the Federal Constitution was proposed by the Virginia Convention of 1788 on motion of Patrick Henry. (3 Ell. Deb., 593, 658.) It was applied to "capital and criminal prosecutions." The words "criminal prosecution" are in the amendment as proposed by Mr. Madison (Annals of Congress, June 8, 1789, p. 435), and reported from Mr. Vining's committee. (Id., July 21, 1789, pp. 664, 665; July 28, 1789, p. 672; August 17, 1789, p. 756.) The words "criminal case" were not in the original form of the Fifth Amendment (p. 433), but were inserted on motion of Mr. Lawrence, of New York (p. 753). The amendments were afterwards submitted to a special committee of arrangement, who recast them into their present form, they having been originally proposed as amendments to be inserted at various places in the body of the Constitution. (Id., August 19, 1789, p. 766; August 22, 1789, p. 778; August 24, 1789, p. 779.) They were afterwards considered in detail in the Senate; a conference committee was appointed, of which the House members were Messrs. Madi-

son, Sherman, and Vining; and the present Sixth Amendment was one of those amended. (Id., September 21, 1789, p. 905; September 24, 1789, p. 913.) Two of the House conferees—whether they conferred informally with all the Senators, or with some Senatorial committee, does not appear—had been prominent members of the Convention of 1787, and were careful in point of style. There can be little doubt that the difference in expression between the Fifth and Sixth Amendments was deliberate.

Under these circumstances it would seem that the same accuracy of distinction should be looked for in the first ten amendments to the Constitution as is looked for in the original Constitution itself. To use the words "criminal prosecution," meaning a civil action, would be a gross misuse of language.

It will be noticed that in certain of the Declarations of Rights the right not to incriminate oneself, as well as the right to be confronted with the witnesses, was confined to criminal *prosecutions*. (Virginia, Art. VIII; North Carolina, Art. VII.) In others, neither was expressly limited to criminal prosecutions, but apparently each was intended to be so confined. (Masssachusetts, Art. XII; New Hampshire, Art. XV.) That of Pennsylvania was ambiguous in this respect (Art. IX), as also Delaware (§ 7). Maryland had a peculiar form (Art. XX). New Jersey had neither provision (Art. XVI), but adopted the old language of William Penn. (Pennsylvania Charter of Privileges of 1701, Art. V.) New York had neither provision. (See Const., Art. XXXIV.) Connecticut had neither provision. Rhode Island had neither Constitution nor Declaration of Rights.

The distinction drawn in this respect in the Federal Constitution is thus the more significant.

The view is confirmed by an examination of the reasons for requiring a confrontment of witnesses, and by comparison of the various privileges reserved by this amendment to defendants in criminal prosecutions.

It is well known that, while defendants in misdemeanor cases under the ancient English practice might have counsel, they had no such right in prosecutions for felony. They did ordinarily have the assistance of counsel for some purposes of the trial in felony cases, but this was only by customary permission of the court, and not as a matter of right; and the custom was a comparatively recent one.

Consequently it was of vital importance that the prisoner should have the right to be confronted at the trial with the witnesses against him, so that he could cross-examine them. The establishment of this right followed violent struggles in the earlier State Trials, and it became common to have an "altercation," the prisoner and his accusers disputing face to face before the jury. If testimony was, as in earlier times, taken by deposition, it was without due protection to the prisoner, who was ordinarily in close confinement as well as without the aid of counsel.

For these reasons the right to be confronted with the witnesses had long become an object of veneration.

It was entirely inapplicable to civil proceedings, where both parties had counsel, and the inability of the courts

to order depositions *de bene esse*, except as conditions upon a continuance or other favor, was an admitted defect in the law which was already, before the American Revolution, in process of remedy.

The other clauses of the Sixth Amendment also remedy grievances peculiar to the criminal law, and unknown in the ordinary civil courts, or in revenue or admiralty procedure.

Everywhere outside of the criminal jurisdiction defendant had full opportunity to examine his adversary's pleading and make any objection, substantial or technical, which his counsel's ingenuity could suggest; he had the right to *subpœna* witnessses; and he had assistance of counsel at every stage of the case. He had equal right with the plaintiff to force a speedy and public trial.

These, with the confrontment clause, comprise all the rights guaranteed by the Sixth Amendment as originally proposed, and as it first passed the House of Representatives. The clause inserted in the Senate, providing for a jury trial in the State and district wherein the crime shall have been committed, introduced a doctrine also peculiar to criminal law: namely, that crimes are in their nature local. (*Rafael* v. *Verelst*, 2 W. Bl., 1055, 1058, quoted in *Huntington* v. *Attrill*, 146 U. S., 657, 669.) Actions for penalties were regarded as transitory in nature (1 Tidd's Practice, p. 429), and, except as otherwise provided by certain ancient statutes, were instituted in any county at the option of the plaintiff, like other transitory actions. (*Id.*, p. 430.) While all *qui tam* actions were made local by a statute of Elizabeth (*Bar-*

ber v. *Tilson*, 3 Maule & Sel., 429), yet all actions for penalties brought by the Attorney General remained transitory. (*Attorney-General* v. *Browse*, Bunbury, 236; *Attorney-General* v. *Moyer*, *id.*, 261; *Attorney-General* v. *Hines*, Parker, 182; *Attorney-General* v. *Ferris*, 3 Anstr., 871.)

In view of the clear and long-settled distinction between criminal prosecutions and informations for penalties, it is impossible to believe that a constitutional amendment intended to embrace the latter should have been so drawn as in terms to include the former only, when this very matter of venue was one of the subjects of the amendment. But, as will be pointed out, this same Congress, at the same session, adopted legislation under which the venue was held by this court to be elsewhere than where the crime was committed.

A forfeiture suit is not nearly so penal in character as a contempt proceeding, terminating in imprisonment. That contempt proceedings are criminal is familiar. (*Ex parte Kearney*, 7 Wheat., 38, 43; *Ex parte Watkins*, 3 Pet., 193, 208.) "Contempt of court is a specific criminal offense. The imposition of the fine was a judgment in a criminal case." (*New Orleans v. Steamship Co.*, 20 Wall., 387, 392.) Yet it is a civil proceeding, and the Sixth Amendment gives no right to trial by jury. (See *In re Debs*, 158 U. S., 564, 576, 594.)

Still another practical construction of the Constitution, showing that fines, penalties, and forfeitures are not

regarded as in a strict sense criminal sentences, is to be found in the various statutes giving the Secretary of the Treasury power to remit them. These statutes, dating from 1797, have never been considered to infringe upon the President's constitutional prerogative "to grant reprieves and pardons for all offenses against the United States, except in cases of impeachment." (*The Laura*, 114 U. S., 411.)

V.

The fact that fine and imprisonment may also be inflicted for this offense is immaterial.

It is true that the person making the entry may be convicted of a crime, and not only fined, but imprisoned in a penitentiary. This, however, takes place in an altogether different proceeding. So far as the forfeiture is concerned, the statute of 1890 evidently contemplates an information *in rem* or a civil action. The last clause of the statute evidently contemplates an ordinary criminal prosecution, commencing with an indictment as required by the Fifth Amendment. In the phrase "shall upon conviction be fined * * * or be imprisoned," etc., the word "conviction" plainly does not refer to the judgment *in rem* or *in personam* under the first portion of this section. (Compare Collection Act of 1799, § 82, Rev. St., § 3049.)

Would a judgment in favor of the United States in this action have the effect of *res adjudicata* in a criminal prosecution for the same offense? Certainly not if the principle of *United States* v. *McKee* (4 Dill., 128) applies to this case; for if so, the forfeiture is a bar to any crim-

inal prosecution. It would seem, however, that the case just cited is not here in point, but that the present section makes the forfeiture a cumulative remedy. (*In re Leszynsky*, 16 Blatchf., 9; *Origet* v. *United States*, 125 U. S., 240, 246.)

If, then, the United States should win the present suit, and thereupon institute a criminal prosecution, seeking a judgment of fine and imprisonment, would the judgment in this suit be conclusive against the defendant in the criminal prosecution?

The converse has been held by this court to be the case in *Coffey* v. *United States* (116 U. S., 436). It was there held that an acquittal upon a criminal prosecution was conclusive in a civil suit for a penalty for the same offense.

If an acquittal was conclusive, a conviction would be equally conclusive. The court say (p. 443):

> It is urged as a reason for not allowing such effect to the judgment that the acquittal in the criminal case may have taken place because of the rule requiring guilt to be proved beyond a reasonable doubt, and that on the same evidence on the question of preponderance of proof there might be a verdict for the United States in the suit *in rem*. Nevertheless, the fact or act has been put in issue and determined against the United States; and all that is imposed by the statute as a consequence of guilt is a punishment therefor. There could be no new trial of the criminal prosecution after the acquittal in it; and a subsequent trial of the civil suit amounts to substantially the same thing, with a difference only in the consequences following a

> judgment adverse to the claimant. When an acquittal in a criminal prosecution in behalf of the Government is pleaded or offered in evidence by the same defendant in an action against him by an individual, the rule does not apply, for the reason that the parties are not the same, and often for the additional reason that a certain intent must be proved to support the indictment which need not be proved to support the civil action. But upon this record, as we have already seen, the parties and the matter in issue are the same.

This case is an extreme one in the law of *res adjudicata*, and has evidently given difficulty to subsequent text writers. In extending the doctrine so as to make a judgment in a criminal proceeding conclusive upon civil action, contrary to the general rule (Bigelow on Estoppel, 5th ed., pp. 115, 116), it proceeds upon the theory that there are only two identities necessary, namely, identity of parties and identity of facts to be proved. Mr. Black, however, in his recent well-known text-book, gives an additional reason for the rule which, down to the Coffey case, had always excluded criminal judgments from evidence in civil suits by way of estoppel. (2 Black on Judgments, § 529.)

> Since the parties to a criminal prosecution and those in a civil suit are necessarily different, and as the objects and results of the two proceedings *and the rules of evidence* which apply to them, respectively, are equally diverse, it follows that the judgment in the former can not be used by way of estoppel in the latter, save for the single purpose of proving its own existence, if that becomes a relevant fact.

Mr. Freeman says (1 Freeman on Judgments, § 319):

> The record of a conviction or of an acquittal is not, according to a decided preponderance of authority, conclusive of the facts on which it is based in any civil action. * * * Even where the parties are the same, there seems to be an injustice in admitting an acquittal in a criminal prosecution in evidence in a civil action, because to procure a conviction in a criminal prosecution the jury must be convinced beyond a reasonable doubt, while in a civil action it is their duty to find according to the preponderance of evidence.

Mr. Freeman recognizes that the Coffey case is an authority against this position. That case was apparently decided almost without argument on behalf of the Government, whose counsel cited no authority in his brief except *The Palmyra* (4 Wheat., 1) (which, indeed, was the only Supreme Court decision cited by him in his brief in the Boyd case, argued at the same term). It is not necessary, however, to discuss this case at length, because whatever may be the effect of a criminal acquittal upon a civil suit, a judgment for the plaintiff in a civil suit can hardly dispense with other evidence in a prosecution for an infamous crime. Mr. Freeman says (1 Freeman on Judgments, 4th ed., 319a):

> A judgment in a civil case must generally be excluded from evidence in a criminal prosecution, because the parties are not the same, and were they the same, it would be improper to receive a judgment in a civil case as evidence of the commission of a crime of which the defendant is accused, for the reason that such judgment may be founded on a mere preponderance of evidence not sufficient to satisfy

> the jury beyond a reasonable doubt. And where a suit is brought to recover a forfeiture, and the rule of evidence in criminal cases applies, that all the facts material to sustain such suit must be proved beyond reasonable doubt, a judgment in a civil action between the same parties is not admissible in favor of the plaintiff to establish any fact necessary to the maintenance of a civil action.

Suppose that, instead of suing for the value of the property forfeited, the Government had proceeded *in rem* against the goods, and that these defendants had appeared in the suit as claimants. Then, by § 21 of the Customs Administrative Act, had they failed to introduce any evidence in defense, the court could have directed a verdict in favor of the Government, if the collector had reasonable grounds of suspicion when he made the seizure. (II, *supra.*)

Would a judgment upon this verdict have been admissible as conclusive against the defendant under an indictment? If not, then would a judgment for the plaintiff in the present suit have that effect?

We respectfully submit that to make the judgment in a civil suit like this conclusive in a subsequent criminal prosecution would be contrary to the first principles of our jurisprudence; that it would, in effect, deprive him of his constitutional right to a trial by a jury in the State and district wherein the crime is committed, since it would bind the jury to follow the verdict of another jury impaneled in the district where the offender was found or the property seized.

Hence the omission to confront the witnesses in the present case can have no effect upon a criminal prosecution. It therefore does not violate the Constitution directly or indirectly.

VI.

The inapplicability of the Sixth Amendment to the present case has been in effect settled by the long-continued practice with relation to venue.

It will be remembered that if proceedings for forfeiture are criminal prosecutions, the Constitution requires them to be tried in the district where the crime was committed. The statutes, on the contrary, allow, and in some cases require, the proceeding to be brought where the offender is found or where the seizure is made. (Rev. St., §§ 732, 734; *Keene* v. *United States*, 5 Cr., 304; *The Merino*, 9 Wheat., 391, 402; *The Reindeer*, 2 Wall., 383, 403; *The Ship Octavia*, 1 Gall., 487; *The Abby*, 1 Mason, 360.)

VII.

The question here involved has in effect been decided in the cases relating to proceedings before custom-house appraisers.

In *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How., 272, 282, Mr. Justice Curtis said:

> It may be added, that probably there are few Governments which do or can permit their claims for public taxes, either on the city or the officer employed for their collection or disbursement to become subjects of judicial controversy, according to the course

> of the law of the land. Imperative necessity has forced a distinction between such claims and all others, which has sometimes been carried out by summary methods of proceedings, and sometimes by systems of fines and penalties, but always in some way observed and yielded to.

It will be remembered that in *Auffmordt* v. *Hedden* (137 U. S., 310) a strong contest was made on behalf of the importers against the propriety of the Treasury regulations under which merchant appraisers in the custom-house were proceeding. By these regulations the importer was excluded from the room where evidence was being taken. He was not allowed to see the depositions of the witnesses. He did not even know their names. Nevertheless the decision of the merchant appraisers, made upon this *ex parte* investigation, was held to be absolutely final and conclusive.

That was a purely civil case, but the principles of the decision have since been extended to a case which, like this one, had also a penal aspect.

In *Origet* v. *Hedden* (155 U. S., 228) the appraisers made so large an increase in the importer's valuation as to subject him to a large fine by way of the so-called "additional duties." These duties were originally called "penalties" in the statute books, have been frequently so called by the courts, and have been held to be in fact penalties by the Attorneys General. The history of this legislation and of the departmental and judicial construction thereof is set forth in full at 20 Op., 660–665. The importer's counsel in the Origet case, insisting that he should have had a right to personally attend and cross-

examine the witnesses, laid special stress on the fact that a penalty was involved; but this court again held that he was not even entitled to see the minutes of the appraisers' proceedings, and that their findings, with the penal consequences, were conclusive.

It may be suggested that *Origet* v. *Hedden* is partly based upon the principle that the United States may exclude foreign goods from the country altogether, and therefore may impose what conditions they please upon the importation of the goods, including a waiver of some constitutional privileges. This is true, and it was one of the points urged for the Government in that case. But the point is equally applicable here. The right to be confronted with witnesses is undoubtedly one which can be waived. (*United States* v. *Loughery*, 13 Blatchf., 267; *People* v. *Guidici*, 100 N. Y., 500, 508; see also *Reynolds* v. *United States*, 98 U. S., 145, 160; *United States* v. *Gale*, 109 U. S., 65; *Matter of Cooper*, 93 N. Y., 507; 1 Bishop's New Criminal Procedure, § 1205.) Hence when these defendants imported and entered their goods they impliedly consented to subject themselves to all of the conditions imposed by the Government, and one of these was that questions of mere forfeiture should be tried in the civil courts by civil procedure and in the district where the goods should be seized or the offender found.

It may be suggested that these same considerations might have been urged in *Boyd* v. *United States*. This it is unnecessary to consider, as they were not actually

urged. (*United States* v. *Sanges*, 144 U. S., 310, 320; *Pollock* v. *Farmers' Loan and Trust Co.*, 157 U. S., 429, 575, 576.)

It is respectfully submitted that the judgment should be reversed.

EDWARD B. WHITNEY,
Assistant Attorney General.

O

urged. (*United States* v. *Sauges*, 144 U. S., 310, 320; *Pollock* v. *Farmers' Loan and Trust Co.*, 157 U. S., 429, 575, 576.)

It is respectfully submitted that the judgment should be reversed.

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Assistant Attorney General.

Office Supreme Court U. S.
FILED.
JAN 9 1896
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
SAMUEL ZUCKER ET AL. } No. 794.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Brief for Defendants in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

THE UNITED STATES,
Plaintiff in Error,
against
SAMUEL ZUCKER and WILLIAM JOSEPHY,
Defendants in Error.

No. 794.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT.

This action was commenced by the United States to recover the sum of three hundred and forty-six, 02/100 dollars, the alleged value of certain imported merchandise, which value was claimed as forfeited by the defendants for a violation of the provisions of the Ninth Section of the Act of Congress, approved June 10th, 1890.

The action came on for trial before Judge Addison Brown at a Stated Term of the District Court of the United States for the Southern District of New York, on the 31st day of October, 1895.

After duly opening the case the counsel for the plaintiff, among other things, to sustain the issues on the part of the plaintiff, offered to read in evidence the deposition of

George DeBray, of Paris, in the Republic of France, theretofore duly taken and properly authenticated and certified under letters rogatory duly issued and returned herein.

The defendants' counsel objected to the admission of this testimony upon the following grounds:

1st.—That this action, though civil in form, is in substance a criminal case, and the defendants, by the provisions of the Constitution of the United States, and by the principles of the decision of the Supreme Court in the case of Boyd *v.* United States (116 U. S., 616), are entitled on the trial of this action to be confronted with the witnesses against them.

2d.—That the constitutional right of the defendants to be confronted with the witnesses against them is not secured by giving them notice of the execution of letters rogatory in France, and that their failure to attend on such execution at a place three thousand miles from the place of trial out of the District, and in a foreign country, does not operate as a waiver of their constitutional right, if it can be waived.

See Record, p. 6.

The objection so taken by the defendants' counsel was sustained, the evidence was excluded, and the plaintiff's counsel thereupon duly excepted to the ruling.

When the plaintiff rested its case the defendants' counsel moved that the Court direct the jury to find a verdict for the defendants, which motion was granted, and the jury found a verdict for the defendants, to which direction the plaintiff's counsel duly excepted.

See Record p. 6.

The errors assigned by the plaintiff are:

1st.—The Court erred in excluding the deposition offered on behalf of the plaintiff in error of George DeBray of Paris, in the Republic of France, duly taken and properly authenticated and certified under letters rogatory duly issued and returned herein.

2d.—The Court erred in directing the jury herein to find a verdict for the defendants.

See Assignments of Error, Record, p. 7.

This case comes before this Court upon a writ of error from the judgment so rendered as aforesaid.

See Writ of Error, Record, p. 7.

This writ of error brings up for review the question whether the United States, in actions brought to recover the value of merchandise claimed to have been forfeited for violations of the Administrative Bill of June 10th, 1890, can introduce in evidence the depositions of living witnesses taken out of the jurisdiction of the Court and of the United States when such testimony is material to the plaintiff's case.

The claim of the defendants in error, that this question must be answered in the negative and the judgment of the Trial Court affirmed, is based on the broad constitutional ground that on the trial of cases of this nature the defendant is entitled to be confronted with the witnesses against him.

The question under discussion naturally divides itself under two heads.

1st.—Is this action a "criminal prosecution" within the meaning of the Sixth Amendment?

2d.—Was the deposition offered by the Government admissible in evidence?

PLEADINGS.

The complaint alleges the importation into the United States by the defendants of certain merchandise, and the making, by the defendants, who were the owners, importers and consignees, of an entry in writing of the said merchandise with the Collector at the Port of New York, and the production of a certified invoice thereof before the Collector or his deputies, purporting to show the actual cost of said merchandise purchased, together with a declar

ation accompanying said invoice and entry duly signed and verified in manner and form as required by law.

That the said merchandise was obtained by purchase and was subject to the payment of duty, and was entered by the defendants by means of the said entry, invoice, affidavit, letter and paper, which were false and fraudulent, in that the said invoice did not contain a true statement of the actual cost of said merchandise; and by means of written statements which, as the defendants well knew, were false and fraudulent; and that the defendants were guilty of wilfully and wrongfully concealing and suppressing the actual cost of said merchandise, whereby the United States has been deprived of the lawful duties, or a portion thereof, accruing upon the said merchandise; whereby, by force of the statute of the United States in such case made and provided, to wit, the 9th section of the Act of Congress approved June 10th, 1890, the value of the merchandise referred to, to be recovered from said defendants, became, and is, forfeited to the United States.

That the value of the said merchandise was $346.02, for which sum, together with interest from the date of entry and the costs of the action, the plaintiff demands judgment.

The answer of the defendants admits the importation by them of certain merchandise into the United States, but denies any knowledge or information as to whether the complaint correctly sets forth the quantities and kinds so imported or the place from whence the same was shipped or the vessel by which the same was brought into the United States, and specifically denies each and every other allegation contained in the said complaint.

And as a separate and distinct answer to the complaint, it alleges that the value of the goods did not, nor did any part thereof, become forfeited, as in the complaint alleged; that this action is not brought against the person making the entry of the goods, wares and merchandise in said complaint specified; that the duties on any and all goods imported by the defendants during the time specified in said complaint have been liquidated and paid by the defendants; that more than one year had elapsed since the time of the entry of said goods, wares and merchandise and the bringing of this action, and that the same is barred as by the

statute of the United States in that behalf made and provided.

See Record, pp. 3 and 5.

ARGUMENT.

POINT FIRST.

THIS PROCEEIDNG IS A "CRIMINAL PROSECUTION," WITHIN THE MEANING OF THE SIXTH AMENDMENT.

I.

Among the many grievances of the colonies none received more attention than the infringement of a right to a jury trial, and no right was guarded more jealously or asserted more strongly in the colonial charters, the various declarations of rights, the declaration of independence, the State Constitutions and the Federal Constitution (see Stevens Sources of Cons., pp. 208–211; see Early State Constitutions, *Ibid.*, pp. 249–267; Declaration of Rights, Hinsdale's American Government, pp. 438–444; the Non-importation Agreement, *Ibid.*, pp. 445–449; the Declaration of Independence, *Ibid.*, pp. 450–453; the Constitution of the United States, *Ibid.*, pp., 462–473).

> "The American Revolution," says Hinsdale, "was a kind of continuation of the English Revolutions of 1642 and 1688. * * * The Declaration of Independence and the Constitution of the United States belong to the same series of great charters of human rights as Magna Charta, the Petition of Right, the Bill of Rights and the Reform Bill."
>
> Am. Government, p. 54.

The colonists were familiar with the history of the English people, and the abuses which led to the enactment of Magna Charta and the Bill of Rights. They knew that Magna Charta had secured the right to a jury trial, but

they were also alive to the disregard of that provision by the House of Tudor, as well as the attempts by the then English King to transport them "beyond the seas to be tried for pretended offences," and thus deprive them of the right to a trial by a jury of their peers in the place where the act was committed, and, as said by Mr. Justice Davis, "The history of the world had taught them that what was done in the past might be attempted in the future."

Ex parte Milligan, 71 U. S., p. 2.

It was not strange, therefore, that they should seek to guard their rights by provisions whose meaning could not be misunderstood or evaded.

It will only be necessary to refer to the constitutional provisions, as originally drafted, and afterwards supplemented by the first ten amendments, or "Bill of Rights," commonly called, to ascertain the full meaning of the clause "criminal prosecution," as understood and intended by the States.

The Constitution originally provided as follows:

> "The trial of all crimes, except in cases of impeachment, shall be by jury, and such trial shall be held in the State where the said crimes shall have been committed, but when not committed within any State the trial shall be at such place or places as the Congress may by law have directed."

Clause 3, Article III.

Referring to the general provisions, Mr. Stevens says:

> "It was widely anticipated by the public that the National Constitution drafted at Philadelphia would contain a full enumeration of such ancient rights. * * * Sufficient provision was made in the body of the Constitution for taxation by the Legislature only, for judgment in cases of impeachment, for the privilege of the writ of habeas corpus, for trial by jury in criminal cases, for the definition, trial and punishment of treason, with limitation of historical abuses in such connection, for the prohibiting of bills of attainder, *ex post facto* laws and laws impairing the obligation of contracts or imposing religious tests. * * * But as soon as the draft of the

> Constitution left the Convention, the lack of a formal bill was severely and persistently criticised by the people. And the promise that one should be added as soon as the new government actually got under way was found necessary in order to induce some of the principal States to ratify the instrument."

Sources of Con., p. 213.

And Justice Story, speaking of the original provision, says:

> "But although this provision of a trial by jury in criminal cases is thus constitutionally preserved to all citizens, the jealousies and alarms of opponents of the Constitution were not quieted. They insisted that a bill of rights was indispensable upon other subjects, and that upon this further auxiliary rights ought to have been secured."

Story Const., § 1782, 5 Ed.

Reference to the debates in the State Conventions will show how anxious the members from many of the States were that a provision should be inserted as to the right of a trial by jury even in civil cases, and although it was justly argued that the express provision for trial by jury in criminal cases, in no way abrogated that right in civil cases, still the necessity for such a provision was urged with so much force and vigor as to necessitate the promise of its early passage, and resulted in the enactment of the Seventh Amendment, which provides as follows:

> "In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury shall be otherwise re-examined in any court of the United States than according to the rules of common law."

So jealous were the people of any limitation of this great right, it was claimed that the Constitution should *define* the right of trial by jury in both civil and criminal cases. It was again argued that the mode of trial by jury was well settled and needed no further specification, but this did not satisfy the claimants for further provisions. It was also

pointed out that in civil cases different modes of trial were in use among the several States, and that it would be impossible to assimilate the practice.

The latter objection was at last yielded although not without much strong opposition.

In trials for crime, however, the opposition could not be appeased, and the outcome was the enactment of the Sixth Amendment, which is as follows:

> "In all criminal prosecutions the accused shall enjoy the right to a speedy trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the assistance of counsel for his defense."

See generally Elliott's Debates. The Federalist No. LXXXIV.

The Sixth Amendment is auxiliary to clause 3 of Article III of the original provisions, and defines the rights of persons accused of crime.

The words "criminal prosecution," as used in the Sixth Amendment, and the "trial of all crimes," as used in the body of the Constitution, are convertible terms; one defines the meaning of the other.

If the proceeding is the "trial of a crime," it is within the meaning of the words "criminal prosecution," as used in the Sixth Amendment, and *vice versa*.

That the Sixth Amendment should be considered as part and parcel of the original provision and as co-extensive in meaning with it cannot be denied, for in the words of Judge Cooley:

> "These amendments all sprung from a distrust of power remote from the people, a distrust which the colonial experience had inculcated and which the events leading to the Revolution had intensified. * * * They had enjoyed liberty and a large measure of prosperity under State laws, * * * and when oppression had come, and grown until it seemed intolerable, its source was to be traced to a

distant authority which overruled or displaced the local laws and took away the protection they would have given."

Principles of Cons. Law, p. 208.

"To all intents they are to be regarded as a part of the Constitution in its original unity as a product of the formative period."

Stevens Sources of Const., p. 213.

II.

As to whether this action is within the meaning of the Sixth Amendment may be determined by a consideration, not only of the Sixth, but of the Seventh Amendment as well.

In those two amendments all kinds of criminal and civil common law actions are included.

The framers of the provisions divided actions into two great classes, to wit: Trials for the punishment of crimes, and trials for the enforcement of civil rights.

The former were provided for by the Sixth Amendment, and the latter by the Seventh amendment.

Proceedings not included in the Sixth must come under the Seventh and *vice versa*. In the construction of either, it is proper, if not necessary, to consider both.

Taking as a basis for construction Chief Justice Marshall's often quoted principle, that—

> "as men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas they intended to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said. (Gibbons *v.* Ogden, 9 Wheat., 1-88,) the first inquiry is: Does this proceeding come within the natural meaning of the words, 'criminal prosecution,' or 'trial of a crime?'"

III.

That it does may be regarded as *stare decisis* in this Court.

This Court had occasion to examine the nature of a proceeding in *rem*, under the Act of 1874, to which the statute under discussion is an amendment, and decided that actions in *rem*, under that act, though civil in form, were, in their nature, criminal.

Mr. Justice Bradley, writing the opinion, says:

> "We are also clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are, in their nature, criminal. In this very case the ground of forfeiture, as declared in the 12th Section of the Act of 1874, on which the information is based, consists of certain acts of fraud committed against the public revenue in relation to imported merchandise which are made criminal by statute; and it is declared that the offender shall be fined not exceeding $5,000 nor less than $50, or by imprisonment not exceeding two years or both, and in addition to such fine such merchandise shall be forfeited. These are the penalties affixed to the criminal acts, the forfeiture sought by this suit being one of them. If an indictment had been presented against the claimants, upon conviction the forfeiture of the goods could have been included in the judgment. If the government prosecutor elects to waive an indictment and to file a civil information against the claimants (that is, civil in form), can he by this device take from the proceeding its criminal aspect and deprive the claimants of their immunities as citizens, and extort from them a production of their private papers, or, as an alternative, a confession of guilt. This cannot be. The information, though technically a civil proceeding, is, in substance or effect, a criminal one."

Boyd *v.* U. S., 116 U. S., 616.

While the case at bar is a proceeding *in personam*, the reasoning of the opinion in the Boyd case clearly shows the tests applied by the Court in that action are equally applicable when applied to an action *in personam*.

In commenting on the decision in U. S. *v.* Mason (6 Biss., 350), where it was sought to draw a distinction between actions *in rem* and *in personam*, Judge Bradley says:

> "But where the owner of the property has been admitted as a claimant, we cannot see the force of this distinction, nor can we assent to the proposition that the proceeding is not in effect a proceeding against the owner of the property as well as against the goods; for it is his breach of the laws which has to be proved to establish the forfeiture, and it is his property which is sought to be forfeited; and to require such an owner to produce his private books and papers in order to prove his breach of the laws, and thus to establish the forfeiture of his property is surely compelling him to furnish evidence against himself. In the words of a great Judge: 'Goods, as 'goods, cannot offend, forfeit, unlade, pay duties or 'the like, but men whose goods they are.'"

This decision was followed by this Court in Lees *v.* U. S. (150 U. S., 476), which was an action brought to recover penalties and forfeitures for a violation of the Act of February 26th, 1885, prohibiting the importation of foreign laborers. By Section 3 of that act it is provided:

> "That for every violation of any of the provisions of Section 1 of this act the person, partnership, company or corporation violating the same * * * shall forfeit and pay for every such offense the sum of one thousand dollars, which may be sued for and recovered by the United States or by any person who shall first begin his action therefor, including any such alien or foreigner who may be a party to any such contract or crime, as debts of like amount are now recoverable in the Circuit Court of the United States."

Mr. Justice Brewer, writing the opinion of the Court, said:

> "This, though an action civil in form, is unquestionably criminal in its nature, and in such a case a defendant cannot be compelled to be a witness against himself. It is unnecessary to do more than to refer to the case of Boyd *v.* The U. S., 116 U. S., 616. The question was fully and elaborately considered in the opinion delivered in that case, and within the

rule there laid down it was error to compel this defendant to give testimony in behalf of the government."

IV.

It ought not to be necessary to reopen the discussion so conclusively settled by the decisions in the cases above mentioned.

It may be urged, however, that those decisions were not under the statute which is the basis of the proceeding in the case at bar, and that there are distinguishing features which prevent them from being controlling in this.

To forestall such a claim, reference to the statutes passed by Congress to punish persons violating the revenue laws will be made, and a few general principles will be examined.

(*A*). The Act of June 10, 1890, so far as the punishment for its violation is concerned, is but a collection and condensation of the acts passed prior to its enactment.

The prior acts in force when the Administrative Bill was passed and that act itself are as follows:

Sec. 2839. If any merchandise of which entry has been made in the office of a collector is not invoiced according to the actual cost thereof at the place of exportation, with design to evade payment of duty, *all such merchandise, or the value thereof, to be recovered of the person making entry, shall be forfeited.*

Sec. 2864. If any owner, consignee or agent of any merchandise shall knowingly make, or attempt to make, an entry thereof by means of any false invoice, or false certificate of a consul, vice consul or commercial agent, or of any invoice which does not contain a true statement of all the particulars hereinbefore required, or by means of any other false or fraudulent document or paper, or of any other false or fraudulent practice or appliance whatsoever, *such merchandise (or the value thereof) shall be forfeited.*

Sec. 3082. If any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any merchandise, contrary to law, or shall receive, conceal, buy or sell, or in any manner facilitate the transportation, concealment or sale of such merchandise after importation, knowing the same to have been imported contrary to law, *such merchandise shall be forfeited, and the offender shall be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or be imprisoned for any time not exceeding two years, or both;* whenever on trial for a violation of this section the defendant is shown to have, or to have had, possession of such goods, such possession shall be deemed evidence sufficient to authorize conviction, unless the defendant shall explain the possession to the satisfaction of the jury.

Sec. 12. That any owner, importer, consignee, agent or other person who shall, with intent to defraud the revenue, make, or attempt to make, any entry of imported merchandise by means of any fraudulent or false invoice, affidavit, letter or paper, or by means of any false statement, written or verbal, or who shall be guilty of any wilful act or omission by means whereof the United States shall be deprived of the lawful duties, or any portion thereof, accruing upon the merchandise, or any portion thereof embraced or referred to in such invoice, affidavit, letter, paper or statement, or affected by such act or omission, shall, for each offense, *be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or be imprisoned for any time not exceeding two years, or both; and, in addition to such fine, such merchandise shall be forfeited;* which forfeiture shall only apply to the whole of the merchandise in the case or package containing the particular article or articles of merchandise to which such fraud, or alleged fraud, relates; and anything contained in any act which provides for the forfeiture or confiscation of an entire invoice, in consequence of any item or items contained in the same being undervalued, be, and the same is, hereby repealed.

Sec. 9. That if any owner, importer, consignee, agent or other person, shall make, or attempt to make, any entry of imported merchandise by means of any fraudulent or false invoice, affidavit, letter, paper, or by means of any false statement, written or verbal, or by means of any false or fraudulent practice or application whatsoever, or shall be guilty of any wilful act or omission by means whereof the United States shall be deprived of the lawful duties, or any portion thereof, accruing upon the merchandise, or any portion thereof, embraced or referred to in such invoice, affidavit, letter, paper or statement, or affected by such act or omission, *such merchandise, or the value thereof, to be recovered from the person making the entry, shall be forfeited,* which forfeiture shall only apply to the whole of the merchandise or the value thereof, in the case of package containing the particular article or articles of merchandise to which such fraud or false paper or statement relates, *and such person shall, upon conviction, be fined for each offence a sum not exceeding five thousand dollars, or be imprisoned for a time not exceeding two years, or both, in the discretion of the Court.*

(*B*). In considering the rights of a person accused of violating the Act of 1890, two questions naturally present themselves.

1st. What is the nature of the offense charged; and

2d. What is the nature of the proceeding provided for its punishment?

First.—A violation of the statute is a crime.

(*a*). It is within the legal definition of that word.

> "A crime is any wrong which the government deems injurious to the public at large and punishes through a judicial proceeding in its own name."
>
> Bishop's New Criminal Law, Sec. 32.

It is—

> "an act committed or omitted in violation of a pub-
> "lic law forbidding or commanding it."
>
> Bouvier's Law Dict.

The latter is the definition adopted by this Court in U. S. *v.* Eaton, 144 U. S., 677.

(*b*). The offense charged by the statute is an act deemed injurious to the Government.

The words of the statute are that any person committing or omitting an act "by means whereof the United States shall be deprived of the lawful duties or any portion thereof," shall be punished, thereby making the act an offense against the Government.

(*c*). The punishment provided by the act is imposed, not as a compensation for the injury sustained, but as punishment for the offense.

The distinction between civil and criminal penalties, provided by statute, is whether the real end or object is punishment or reparation.

By the Act of 1890, five distinct punishments are provided.

First.—Forfeiture of the goods.

Second.—Recovery of the value of the goods.

Third.—Fine not exceeding five thousand dollars.

Fourth.—Imprisonment not exceeding two years.

Fifth.—Both fine and imprisonment.

Not one of these punishments is intended as compensation to the Government.

Congress having power to lay duties and imposts, the duties and imposts laid by the act of Congress are debts due the Government from importers, which may be recovered by a simple common law action.

Experience, however, had taught such acts would be violated, the revenue laws evaded, and the United States defrauded, and as there are no common law offences against the United States (U. S. *v.* Eaton, 144 U. S., 677, and cases there cited), Congress made a violation of this Tariff Act a crime, and imposed heavy and severe punishments.

In the Boyd case (*supra*) Justice Bradley says: "The ground of forfeiture consists of certain acts of fraud committed against the public revenue, in relation to imported merchandise, which are made criminal by the statute."

(*d*). The offence is not merely a crime, but an infamous crime, within the meaning of that term as construed by this Court.

It involves a punishment by imprisonment for a term exceeding one year, and such offences are held to be infamous crimes.

This was so held by this Court in Mackin *v.* The U. S. (117 U. S., p. 348), in which case all crimes punishable by imprisonment in a State prison or penitentiary, with or without hard labor, are said to be infamous crimes.

Writing the opinion for the court, Mr. Justice Gray said:

> "By the express provisions of Acts of Congress, either a sentence to imprisonment for a period longer than one year, or a sentence to imprisonment and confinement at hard labor, may be ordered to be executed in a State prison or penitentiary, and the convict, while thus imprisoned, is subject to the same discipline and treatment as convicts sentenced by courts of the State. How far a convict sentenced by a court of the United States to imprisonment in a State prison or penitentiary, and not in terms to hard labor, can be put to work, either as part of his punishment or as part of the discipline and treatment of the prison, was much discussed at the bar, but we have not found it necessary to dwell upon it, because we cannot doubt that at the present time imprisonment in a State prison or penitentiary, with or without hard labor, is an infamous punishment."

This case followed the decision of this Court in *ex parte* Wilson, 114 U. S., p. 417.

There can be then no doubt as to the nature of the offence.

Second.—A proceeding for the punishment of the offence is a criminal prosecution.

(*A*). As to the nature of the punishment sought to be imposed by this proceeding.

As has been already said, several punishments are provided by the statute.

The only one necessary to consider under this head is the punishment by the recovery of the value of the goods from the person making the entry.

In its nature, that is a pecuniary penalty or fine. Punishment by such means is one well recognized in criminal law.

> "Amongst the ancients all punishments were pecuniary, but in process of time this sort of punishment became contemptible, and then for some crimes death ensued."
>
> 3 Salkeld, 33; Am. Eng. Enc. of Law, Vol. 7, p. 991.

Under the Saxons pecuniary punishment was inflicted for the loss of an eye, an ear, a hand or a foot, and even for the loss of life. "Every man's life had its value, called a 'were,' or *capitis estimatio.*"

Reeves's Hist. of Eng. Law, Vol. 1, p. 193.

By a punishment in the form of a pecuniary penalty or fine a man is deprived of his property.

The right of private property is as sacredly guarded by the Constitution as the right of personal liberty. No man can be deprived of either "without due process of law."

The right to deprive him of his liberty finds its justification in the inherent power of every government to enforce its laws by a punishment for their breach. Without such a power government would be a farce.

It is no less an invasion of a sacred right if it is sought to reach his property, and the right to do so can only be derived from the same source.

Behind his property is the man himself, and it cannot be touched without injuring him.

In the words of Judge Dillon:

> "Property, therefore, connects itself inseparably with the personality of its owner. His dominion over it arises from his personal rights in and concerning it. Properly and legally regarded, the rights of the owner are personal rights, and not that incomprehensible abstraction called the right of things. Ihering puts this in a striking way: "In making the object my own I stamped it with the mark of my own person; whoever attacks it attacks me; the blow which strikes it strikes me, for I am present in it. Property is but the periphery of my person extended to things."
>
> Address before N. Y. Bar Asso., Jany. 15, 1895; 29 Am. Law Review, p. 171.

(*B*). The character of the punishment is not changed by the remedy provided for its enforcement.

(*a*). The question is not raised by the record in this case, because it was not desired to rest the decision

on any technical ground; but it may well be questioned, as was said by Mr. Justice Field, "Whether the only mode for a recovery of the penalty is not by indictment."

U. S. *v.* Chouteau, 102 U. S., 603.

The Constitution requires that "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury."

See Const., Art. V.

The offence being punishable by imprisonment for a term not exceeding two years, it certainly comes withing the protection of that provision.

(*b*). Admitting that the penalty may be recovered in a civil action, the character of the proceeding is not changed.

It is said by Bishop in his New Criminal Law:

"To render a proceeding criminal, it is generally immaterial whether it is by indictment, information or complaint being in the name or on behalf of the State" (Sec. 32).

The Court will look beyond the remedy to the right itself, and from that determine the nature of the proceeding.

In the case of Wisconsin *v.* Pelican Ins. Co. (127 U. S., 265), this Court decided that they would even look behind a judgment of a State Court sought to be enforced in the United States Court, to ascertain the nature of the action, for the purpose of determining whether the courts of the United States had jurisdiction.

Having ascertained the basis of the proceeding, it is very easy to determine its character, for, as was said by Chief Justice Waite:

"Proceedings to enforce civil rights are civil proceedings and proceedings for the punishment of crimes are criminal proceedings."

Ex parte Tom Tong, 108 U. S., 556–559.

The Act of 1890 not having prescribed the mode for the enforcement of the penalty, the Government had the right to adopt any appropriate proceeding for that purpose.

As was said by Chief Justice Marshall:

> "The Statute which creates the forfeiture does not prescribe the mode of demanding it; consequently either debt or information would lie."
>
> Adams *v.* Woods, 2 Cranch, 336.

If Congress had expressly provided that prosecution under the Statute must be by indictment, and that upon conviction the defendants must pay the value of the merchandise forfeited, who would question the nature of the proceeding? Can mere silence as to the mode of prosecution change its character? There is nothing in the language of the Statute to show that Congress intended to make it a civil proceeding, and it would have exceeded its powers if it had.

If the Government had elected to prosecute these defendants by indictment, and to punish them by the fine or imprisonment prescribed by the Statute, no one would attempt to say that the proceeding was not a criminal one.

Or, if it had proceeded in an action *in rem*, then, under the decision in the Boyd case (*supra*), it could not be successfully maintained that the proceeding was not, in its nature, criminal.

How, then, if it elects to prosecute by summons and complaint wherein judgment may be rendered for a penalty equally severe with the judgment in the action *in rem*, and probably more severe than the fine in the proceeding prosecuted by indictment, and in all three of which the violation of the Statute is the act to be punished, can it be successfully claimed that the character of the proceeding loses its criminal aspect and becomes in reality, as well as in form, a civil action?

Is there a civil right to be enforced in one more than in the others? Is not the aim of each the punishment of the crime?

As was said by Mr. Justice Field:

> "Admitting that the penalty may be recovered in a civil action as well as by a criminal prosecution, it is still as a punishment for the infraction of the law. The term 'penalty' involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution."

U. S. *v.* Chouteau, 102 U. S., 603.

Or, in the language of Mr. Justice Gray:

> "The cause of action was not any private injury, but solely the offence committed against the State by violating her law. The prosecution was in the name of the State, and the whole penalty when recovered would accrue to the State. * * * The real nature of the case is not affected by the forms provided by the laws of the State for the punishment of the offence. It is immaterial whether by the law of Wisconsin the prosecution must be by indictment or by action, or whether under that law a judgment there obtained for the penalty might be enforced by execution by *scire facias* or by a new suit. In whatever form the State pursues her right to punish the offence against her sovereignty, every step of the proceeding tends to one end, compelling the offender to pay a pecuniary fine by way of punishment for the offence."

Wisconsin *v.* Pelican Ins. Co., 127 U. S., 265.

And in the case of the United States *v.* Shapleigh (54 Federal Reporter, 126), the Circuit Court of Appeals for the Eighth Circuit Court held that a suit under Revised Statutes, Section 3490, to recover the double damages and forfeiture prescribed against any one presenting a false or fraudulent claim against the United States to one of its officers for payment, while civil in form, was criminal in its nature and effect, and that the Government must prove its case beyond a reasonable doubt.

Judge Sanborn, writing the opinion, says:

> "In controversies of a civil nature the purpose is generally to obtain the determination of some right of person or property, or to recover compensation

for some injury. The parties are ordinarily private citizens or corporations, and the character or liberty of neither party is in jeopardy. In controversies of a criminal nature the purpose is to punish the accused for some violation of his duty to the public. The prosecutor is generally the Government, and the defendant is a private citizen, whose character and either his life, liberty or property, and sometimes all of them, are placed in jeopardy. To this wide difference in the purpose, the character and situation of the parties and the natural effects of findings and judgments against the defendants in controversies, civil and criminal, is it due that the rule became established that, to warrant a verdict or finding against the defendant in the latter, evidence sufficient to satisfy the jury or court beyond a reasonable doubt is required; while in the former, evidence preponderating in his favor, but less convincing, is sufficient to warrant a recovery by the plaintiff. The presumption that every man is innocent until the contrary appears and a consideration of the irreparable injury to the defendant that must result from an unjust conviction, tended to the establishment of this rule; but doubtless the controlling consideration was the inequality of the parties in power, situation and advantage in criminal cases where the Government, with its unlimited resources, trained detectives, willing officers and counsel learned in the law, stood arrayed against a single defendant unfamiliar with the practice of the courts, unacquainted with their officers or attorneys, often without means, and frequently too terrified to make a defense if he had one, while his character and his life, liberty or property rested upon the result of the trial. Proof sufficient to satisfy beyond a reasonable doubt, then, is required in a criminal case, because its purpose is punishment, not compensation for injury; its prosecutor is the State; the result to the defendant of its successful prosecution is irreparable loss of character and the loss of either life, liberty or property, and because the presumption is that every man is innocent until the contrary appears; while less convincing evidence will authorize a recovery in a civil suit, because its purpose is generally compensation for injury or the determination of rights, not the punishment of the offender; the litigants are generally private parties, more nearly equal in resources, advantages and situation, and neither the character, life nor liberty of either is ordinarily at stake.

"Now, if the Government enacts a statute which provides that a case in its nature criminal, whose

purpose is punishment, whose prosecutor is the State, and whose successful prosecution disgraces the defendant and forfeits his property to the State as a punishment for crime, may be brought in the form of a civil suit, does that change the rule of evidence that ought to be applied to it? If a State provides that all proceedings for the punishment of crime shall be conducted in the form of civil suits, does that change their nature or the amount of evidence that ought to be required to convict the defendants of the crimes? Is a wolf in sheep's clothing a wolf or a sheep? Take the case at bar. The crimes with which the defendant was charged were felonies. The Government might have proceeded by indictment to punish him for them under Section 5428. If it had done so, its case must have been proven beyond a reasonable doubt. It elected to proceed under Section 3490, by a civil suit, to recover over $300,000 in penalites to punish the defendant for the same crime. The penalties sought to be inflicted by the latter proceeding are far heavier than any that the Court would probably have inflicted under the former. In each proceeding the same Government, with its unlimited resources, proceeds against the same citizen to punish him for the same crimes, and in each the single question for the jury to determine is, was this defendant guilty of these felonies? Every consideration which induces the courts to establish the rule that the prosecutor must prove the crime charged beyond a reasonable doubt — the inequality of the parties in power, situation and advantage; the purpose of the proceeding, which is the punishment of the defendant, not compensation for injury; the irreparable disgrace and injury that must result to the defendant from any unjust recovery, and the presumption of his innocence— demands that this rule be applied to the latter to the same extent as it would be to the former proceedings. It is not the form but the nature of this proceeding that must determine the rule to be applied to it. To protect the substantial rights of parties, to wisely administer the law, courts must frequently look beyond the outward form to the real substance and nature of things."

(*c*). Proceedings for the punishment of crime by civil actions for the collection of the penalty are well known.

As was said by Chief Justice Marshall:

"Almost every fine or forfeiture under a penal

statute may be recovered by an action of debt as well as by information."

Adams *v.* Woods, 2 Cranch, 336–361.

When brought by the Government in its own behalf they are called penal actions, but when by an individual, for the benefit of himself as well as the Government, they are called *qui tam* actions.

Am. Eng. Enc. of Law, Vol. 18, p. 270.

Penal actions and *qui tam* actions have always been considered *quasi* criminal in their nature, and subject to the provisions relating to the criminal branch of jurisprudence.

Chief Justice Marshall held an action of debt brought to recover the sum of $2,000 as a forfeiture under the Act of March 22, 1794, prohibiting slave-trading to be barred by the statute, entitled, "An Act for the punishment of certain crimes against the United States," passed April 30, 1790 (Statutes at Large, vol. 1, p. 113), which provided that no person shall "be prosecuted, tried or punished for any offence not capital, nor for any fine or forfeiture under any penal statute, unless the indictment or information for the same shall be found or instituted within two years," etc., etc., although the Attorney-General argued that an action of debt is a civil, and not a criminal, process; that the Act of Congress on which defendant relied was entitled "An Act for the punishment of crimes against the United States," and that the limitation it contained was intended to be a limitation of criminal prosecutions, as it mentioned only proceedings by indictment and information.

Adams *v.* Woods, *supra.*

See also State *v.* Chicago, etc., R. R., 37 Fed. Rep., 497.

And Mr. Justice Brewer said

"This action is what is known as a *qui tam* action; it is civil in form, but it is to recover a penalty imposed by a penal statute, and is, therefore, partially at least, criminal in its nature."

State *v.* Kansas City R. R. Co., 32 Fed. Rep., 726.

The decision of this Court in Wisconsin *v.* Pelican Ins. Co, *supra*, can leave, however, no doubt as to the nature of such proceedings

IV.

The recovery of a judgment in this action would bar any further prosecution based on the same cause of complaint.

The act complained of is indivisible, but several punishments are provided which may be enforced against the person offending against the statute.

The Government may elect which remedy to pursue, but having elected one it cannot, if successful or unsuccessful, pursue another.

As is said in Freeman on Judgments (3d Ed.), Sec. 225:

> "The State cannot split this offence into parts and prosecute it by fractions. A conviction of any part may be pleaded in bar to a prosecution for any other part. And generally where a criminal act is indivisible the conviction of any part of the act bars a prosecution for any other part."

And likewise—

> "An acquittal under an indictment for any offence is a bar to any subsequent indictment substantially like the former."
>
> Freeman on Judgts. (3d Ed.), Sec. 318.

This rule is founded on the principle of *res adjudicata*, as well as on the great constitutional provision that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb."

That the exemption from double prosecution extended to *quasi* criminal proceedings was distinctly decided by this Court in Coffey *v.* United States (116 U. S., 436).

Justice Blatchford, writing the opinion for the Court, said:

> "It is also true that the proceeding to enforce the forfeiture against the *res* named must be a proceeding *in rem* and a civil action, while that to en-

force the fine and imprisonment must be a criminal proceeding, as was held in this Court in The *Palmyra* (12 Wheaton, 1), yet where the issue raised as to the existence of the act or fact denounced has been tried in a criminal proceeding instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person on a subsequent trial of a suit *in rem* by the United States, where, as against him, the existence of the same act or fact is the matter in issue as a cause for the forfeiture of the property prosecuted in such suit *in rem*. * * * When an acquittal in a criminal prosecution in behalf of the Government is pleaded or offered in evidence by the same defendant in an action against him by an individual, the rule does not apply, for the reason that the parties are not the same, and often for the additional reason that a certain intent must be proved to support the indictment, which need not be proved to support the criminal action; but upon this record, as we have already seen, the parties and the matter in issue are the same. * * * This doctrine is peculiarly applicable to a case like the present, where in both proceedings, civil and criminal, the United States is the party on the one side and the claimant the party on the other side.

"The judgment of acquittal in the criminal proceedings ascertained that the facts which were the basis of that proceeding, and are the basis of this one, and which are made by the statute foundation of any punishment, personal or pecuniary, did not exist. This was ascertained once for all between the United States and the claimant in the criminal proceedings, so that the facts cannot be again litigated between them as the basis of any statutory punishment denounced as a consequence of the existence of the facts."

And so in the case of the United States *v.* McKee (4 Dillon, 128), before Mr. Justice Miller and Judge Dillon, the defendant had been convicted and punished under a section of the revised statutes for conspiring with certain distillers to defraud the United States by unlawfully removing distilled spirits without payment of the taxes thereon. He was afterwards sued in a civil action by the United States under another section to recover a penalty of double the amount of taxes lost by the conspiracy and fraud.

The two litigated prosecutions were held to be but one, and the suit for the penalty was held to be barred by the judgment in the criminal case.

And in the case of United States *v.* Chouteau (102 U. S., 603) it was held that a compromise with the Government by which a specified sum was paid by the defendant and received by the Government "in full satisfaction, compromise and settlement of said indictments and prosecutions," was a bar to a proceeding to recover the penalty imposed by the statute.

Mr. Justice Field said:

> "The compromise pleaded must operate for the protection of the distiller against subsequent proceedings as fully as a former conviction or acquittal. He has been punished in the amount paid upon the settlement for the offence with which he was charged, and that should end the present action according to the principle on which a former acquittal or conviction may be invoked to protect against a second punishment for the same offence. To hold otherwise would be to sacrifice a great principle to the mere form of procedure and to render settlements with the Government delusive and useless."

If the prosecution for the fine and imprisonment is barred by an action *in rem*, or by a recovery of the penalty, it can only be on the ground that the action *in rem*, or the action to recover the penalty is in its nature criminal, and that the recovery was had as a punishment for the offence.

It is too well settled to need authorities to support the statement that a civil proceeding, in its nature civil, is in no way a bar to a criminal proceeding.

On the decisions in these cases alone this proceeding must be held to be a criminal prosecution.

V.

As the facts to be determined by a trial of this proceeding are the same facts in issue on an indictment for this offense, and when established by judgment are conclusive

on both parties, therefore the same rules prescribed in the trials of criminal cases should be applied in the trial of this.

As has already been pointed out, the basis of any proceeding under the Statute is the violation of its requirements.

The parties to this action are identical with the parties to any prosecution by indictment.

The fact in issue, and the parties being the same, the reason for the rule that a judgment in a civil action is not evidence in a criminal action does not exist.

> "The chief reason for excluding the record of a criminal prosecution from being evidence in a civil action, is that the parties to the two proceedings are different. One who has been damaged by some criminal act of another has a claim for remuneration, independent of the right of the public to proceed against the offender, and to inflict the penalty prescribed by law. This right to compensation in damages ought not to be and is not dependent on the success or failure of the prosecution conducted by the people. If it were, the party most injured would be prejudiced by a proceeding to which he was not a party and which he had no power to control."
>
> Freeman on Judgments, Sec. 319.

None of these reasons would apply in a prosecution by the Government of separate remedies under the Statute.

While this point was expressly excepted from the decision in the Coffey case, still the reasons assigned for that decision would certainly make a judgment rendered in this proceeding conclusive evidence in the proceeding by indictment.

Whatever rights the defendants have in the latter proceeding ought to be enforced in the former, lest the privileges of a trial by jury, with all its incidents guaranteed by the Sixth Amendment, be denied them by means of a judgment rendered upon evidence incompetent and inadmissible in a criminal trial.

VI.

Equally strong arguments that this is a criminal prosecution might be made by showing that this proceeding is not

a suit at common law within the meaning of the Seventh Amendment.

As has before been remarked, the framers of the Constitution intended to include in these two amendments all proceedings, both civil and criminal, which, by the course of the common law, were triable by jury.

They divided the actions into two great classes, to wit: Trials for the punishment of crimes, and trials for the enforcement of civil rights.

The former were provided for by the Sixth Amendment, and the latter were provided for by the Seventh Amendment.

That under the Seventh Amendment only actions relating to civil rights were intended is made clear by the use of the word "controversy," which has been held by this Court to be peculiary applicable to such actions.

> "The Constitution is particular in expressing the parties who may be the object of the jurisdiction in any of these cases, but in respect to the subject matter, upon which such jurisdiction is to be exercised, uses the word 'controversies' only. The Act of Congress more particularly mentioned civil controversies, a qualification of the general word in the Constitution, which I do not doubt every reasonable man will think well warranted, for it cannot be presumed that the general word 'controversies' was intended to include any proceedings that relate to criminal cases, which, in all instances that respect the same government only, are uniformly considered of a local nature, and to be decided by its particular laws. The word 'controversy,' indeed, would not naturally justify any such construction, but nevertheless it was perhaps a proper instance of caution in Congress to guard against the possibility of it."
>
> Chisholm *v.* Georgia (2 Dall., 432).
> Wisconsin *v.* Pelican Ins. Co. (127 U. S., 265).

Can it be said that this proceeding is founded on a debt or claim in the nature of a civil right?

Without the statute what would be the plaintiff's claim? Simply the duties not paid. Certainly not the whole value of the merchandise. This proceeding cannot be a suit at common law to enforce civil rights within the meaning of the Seventh Amendment.

POINT II.

THE ACTION BEING IN ITS NATURE A CRIMINAL PROSECUTION, THE DEPOSITION OFFERED IN EVIDENCE BY THE GOVERNMENT WAS PROPERLY EXCLUDED.

I.

Trial by jury in criminal cases, so far as England is concerned, was unknown until the time of King John.

Magna Charta (9 Henry III, ch. 29) first gave the accused the right to a trial by a jury of his peers.

Am. Law Review, Vol. 11, p. 24.

The ancient rule, in both civil and criminal cases, required that the jurors themselves should be the only witnesses (Stephen's Hist., Crim. Law, Vol. 1, p. 259). Later, however, witnesses were called before the jurors to give evidence of facts of which the jurors were ignorant; but trial by jury, as we know it, was not established, at least so far as criminal cases were concerned, in all its essential features, until the middle of the fifteenth century (Stephen's Hist. Crim. Law, Vol. 1, p. 263; Stevens' Sources of Cons., pp. 235–237).

As to the early mode of procedure in criminal trials, Justice Stephens says:

> "I know of no precise, clear authority for the proposition that a prisoner is entitled to have the witnesses against him examined in his presence * * * till long after the Revolution" (1688) *Ibid.*, p. 358.

Be this as it may, the instances given by him show the fundamental idea of trial by jury in criminal cases was to have both the accused and his accusers brought "face to face" before the jury.

The argument related by him in the form of conversation between Fortescue, Chancellor, and Prince Edward, son of Henry VI, throws light on the original proceedings.

The prince argued with his chancellor in such a way as

to imply that though the jury were witnesses, other witnesses were, or might be, called. The chancellor replied:

> "Witnesses cannot even bring about such a wicked device (as a conviction based on perjury) when what evidence they give in must be in open court, in the presence and hearing of a jury of twelve men, persons of good character, neighbours where the fact was committed, apprised of the circumstances in question, and well acquainted with the lives and conversations of the witnesses, especially as they be near neighbours, and cannot but know whether they be worthy of credit or not."

Ibid., pp. 263–264.

And the incident from "Halifax and its Gibbet Law," which, he says, is the earliest account of criminal trials by jury, relates the practice as follows:

> "He (the bailiff) then issued a summons to the constables of four several towns to attend at a time and place fixed. At which time of appearance both the felons and the prosecutors are brought before them, face to face, and the thing stolen produce to their view."

Ibid., p. 266.

Whatever may have been the original proceedings in criminal trials and the rights of the prisoner to have the witnesses brought before him "face to face" the proceedings of the Court of Star Chamber from the time of its remodelling in the year 1487 by Statute, 3 Henry VII, ch. 1, down to its abolition in the year 1641 by the Statute, 16 Charles I, ch. 10, broke down the "bulwark of personal liberty" erected by Magna Charta, and by virtually abolishing trial by jury in criminal cases became, says Reeves, "the happiest instrument of arbitrary power that ever fell under the management of an absolute sovereign."

Reeves Hist. Eng. Law, Vol 4, p. 212.

> "The penalties inflicted by this Court were so extravagantly severe, and the very design of its judicature so repugnant to the spirit of a free Constitution, that it was always viewed with the greatest abhorrence by the subject, and at length, when political

liberty began to vindicate its claims with more boldness, was totally abolished by parliament" (Statute 16 Charles I, Ch. 10, 1641).

Ibid, p. 212.

The abuses practiced by that tribunal during the reigns of Henry VII and Henry VIII, and especially in cases of treason, called from the people a protest which resulted in the passage of the two statutes, 1 Edward VI, Ch. 12 (1547), and 5 and 6 Edward VI, Ch. 11 (1552), the first statutes which attempted to regulate evidence in criminal trials.

By the latter statutes it was provided that, in all trials for treason, as provided by that act, offenders must

> "be thereof accused by two witnesses; which said accusers, at the time of the arraignment of the party accused, if they be then living, shall be brought in person before the party so accused, and avow and maintain what they have to say against said party to prove him guilty."

Reviewing these statutes, Reeves says:

> "Thus, though not by the common law, yet by statute (1 Edw. VI, c. 12), two witnesses are required, both on the indictment and trial of high treason, petit treason and misprison of treason, and by statutes 5 and 6 Edw. VI, c. 11, they are to be brought face to face with the prisoner."

Vol. V, p. 124.

> "The prisoner," he further says, "who was thus enabled to cross-examine the most formidable of the witnesses against him, being those on whose testimony the bill was found, so far obtained a great advantage. * * * These statutes, by providing a compulsory method of obliging persons to give evidence against the party at the gaol-delivery, that is, both on the indictment and on the trial, took away the challenge to accusers, and gave the prisoner that candid and open trial so much to be wished."

Vol. V, p. 128.

> "The reigns of Edw. VI and Queen Mary," he continues, "constitute a period when a jury first be-

> gan to be a fair and effective tribunal, assuming the right of judging for itself, and when persons whose fate was to be determined by their verdict reposed full confidence in their independence and integrity."
>
> Vol. V, p. 129.

Notwithstanding these beneficent statutes, in the year 1554 the famous Statute 1 and 2, Philip and Mary, Ch. 10, was passed, which enacted that all proceedings should be had after the course and practice of the common law, and this was seized upon as a means of restoring the dreadful power formerly exercised by the courts, and the statutes of Edward VI were held to be thereby repealed.

> "When this point was so settled," says Reeves, "and trials were conducted in pursuance of it, everything fell back into its old state. These two statutes were the only provisions which had ever been made as to evidence, either defining the quality or number of persons whose testimony should be necessary to prove a fact, and when they were looked on as repealed we need only turn back to former periods to judge what security was left for persons laboring under the weight of prosecution for treason. Trials for treason at common law, notwithstanding the boasted security of juries, were a certain mode of destroying a man. Jurors seemed to have surrendered to the court their right of judging and determining. They used to convict without a single witness only upon depositions; those sometimes were not signed by the party making them, and the contents amounting to nothing but hearsay. They might by law, and they often did, in fact, convict upon the arraignment without anything like proof."
>
> Vol. V, p. 127.

The truth and justice of these remarks are fully supported by the facts.

One notable instance is the trial in the year 1603 of Sir Walter Raleigh, accused of high treason by conspiring with Lord Cobham to make Arabella Stuart Queen of England.

Justice Stephen's account of the trial states that—

> "the whole evidence against Raleigh was a 'confession' or examination of Cobham before the Privy Council, and a letter which he wrote afterwards.

> Both in the confession and in the letter Cobham charged Raleigh with this plot by obscure allusions and implications, and with no details. The trial is extremely curious, but its greatest interest in a legal point of view lies in the discussion which occupied most of it on Raleigh's right to have Cobham called as a witness. He knew that Cobham had retracted his confession. * * * For these reasons, and also because, as he said, he felt sure that Cobham would not venture to state openly and on oath what he had confessed before the Council, Raleigh earnestly pressed for his production. He put his demand partly on two statutes of Edw. VI."
>
> Stephen's Hist., Vol. 1, p. 335.

Cobham was not produced and Raleigh was convicted and executed Oct. 29, 1618.

The trial of Raleigh before a court utterly servile to the crown and opposed by Lord Coke, whose part in the trial Stephen declares infamous, (Vol. 1, p. 335) demanding his rights, and urging that

> "the proof of the common law is by witness and jury; let Cobham be here; let him speak it. Call my accuser before my face and I have done."

(State Trials, Vol. II, p. 15) is an impressive warning against depriving the accused of the right to meet his accusers "face to face."

> "Whatever," said Reeves, "judges might pronounce respecting the existing law it never went from the memory of prisoners that a statute had once expressly declared there should be two witnesses to prove treason, and that they should be called face to face."
>
> Vol. V, p. 129.

The abuses practiced in criminal trials, notwithstanding the provisions of Magna Charta along with other oppressions, forced the issue between the crown and the subject, and resulted, as is well known, in the Revolution of 1688, the establishment of a foreign prince on the English throne and the passage of the Bill of Rights.

Justice Stephen considers this period as the time when trials by jury in criminal cases began to differ radically from those preceding the civil war, and among the important particulars in which they differed, referring to those before the Revolution, he says: "At the trial there were no rules of evidence, as we understand the expression. The witnesses were not necessarily (to say the very least) confronted with the prisoner, nor were the originals of documents required to be produced" (Vol. 1, p. 350); but as to trials after the civil war, he states: "Prisoners were not tortured (as they were in every other part of Europe); witnesses were produced face to face, whom the prisoner could cross-examine.

Vol. 1, p. 415.

This reference to the history of criminal trials by jury in England, down to the beginning of the eighteenth century, brings us to a period in the colonial history of our own country, when the first mutterings of discontent against English despotism began to be heard, and the colonies began to assert their right to "all the rights, liberties and immunities of free and natural born subjects within the realm of England."

As has been already said, our ancestors were familiar with the history of the past, and the abuses practiced by the English monarchs, notwithstanding the provisions of Magna Charta.

It was to be expected, therefore, they should insist on an enumeration of their rights in words whose meaning could not be mistaken.

We find them using the words, "In all criminal prosecutions the accused * * * to be confronted with the witnesses against him."

To "confront," says Webster, means "to put face to face."

Giving the word that meaning, as we are bound to do, depositions taken in a foreign country, and not in the presence of the accused, are not admissible in evidence against him.

II.

What is the reason for the provision that witnesses shall be brought face to face with the accused, and of what benefit to the accused?

The inquiry cannot be better answered than by quoting the opinion of Justice Sherwood in the case of State *v.* Berkley (10 Western Rep., p. 67).

He says:

> "I have already suggested the inestimable value to the accused of having the testimony of his witnesses delivered *ore tenus* at the time and place of his trial. All the sages of the law have so regarded it."

Speaking on this subject, Blackstone observes:

> "This open examination of witnesses, *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth than the private and secret examination taken down in writing before an officer or his clerk, * * * where a witness may frequently depose that in private which he will be ashamed to testify in a public and solemn tribunal. * * * Besides, the occasional questions of the judge, the jury and the counsel, propounded to the witness on a sudden, will sift out the truth much better than a formal set of interrogatories previously penned and settled; and the confronting of adverse witnesses is also another opportunity of obtaining a clear discovery, which can never be had upon any other method of trial. * * * In short, by this method of examination, and this only, the persons who are to decide upon the evidence have an opportunity of observing the quality, age, education, understanding, behavior and inclinations of the witness, in which points all persons must appear alike when their depositions are reduced to writing and read to the judge in the absence of those who made them, and yet, as much may be frequently collected from the manner in which the evidence is delivered as from the matter of it."

3 Cooley's Bl., 373.

Touching the same matter, Starkie says:

> "In these, as in so many cases, it is for the jury to estimate the degree of influence by which the testimony of a witness is likely to be corrupted, and to

determine whether, under all the circumstances, he may be the witness of truth. In arriving at this conclusion, a consideration of the demeanor of the witness upon the trial, and of the manner of giving his evidence, both in chief and upon cross-examination, is oftentimes not less material than the testimony itself, and over-forward and hasty zeal on the part of the witness in giving testimony which will benefit the party, whose witness he is, his exaggeration of circumstances, his reluctance in giving adverse evidence, his slowness in answering, his evasive replies, his affectation of not hearing or not understanding the question for the purpose of gaining time to consider the effect of his answer; precipitancy in answering, without waiting to hear or to understand the nature of the question. His inabilty to detail any circumstances wherein, if his testimony were untrue he would be open to contradiction, or his forwardness in minutely detailing those where he knows contradiction to be impossible, and affectation of indifference, are all, to a greater or less extent, obvious marks of insincerity. On the other hand, his promptness and frankness in answering questions, without regard to the consequences, and especially his unhesitating readiness in stating all the circumstances attending the transaction, by which he opens a wide field for contradiction, if his testimony be false, are, as well as numerous others of a similar nature, strong internal indication of his sincerity. The means thus afforded by a *viva voce* examination of judging of the credit due to witnesses, especially where their statements conflict, are of incalculable advantage in the investigation of truth, they not infrequently supply the only true test by which the real characters of the witnesses can be appreciated."

Starkie Ev., 9 Ed., 727-728.

III.

By their nature depositions are but secondary evidence.

Blackstone justly observes that by an oral examination in their presence the jurors have an opportunity of observing—

> "The quality, age, education, understanding, behavior and inclination of the witnesses, *in which all persons must appear alike when their depositions are reduced to writing and read to the judge in the absence of those who made them.*"

3 Cooley's Black, 373.

And says Mr. Starkie:

> "As the depositions of dead or absent witnesses are, in point of law, of a secondary nature to the *viva voce* testimony of witnesses, subjected to the ordeal of cross-examination, so are they inferior and weaker in point of force and effect; so true is it that a witness will frequently depose that in private which he would be ashamed to certify before a public tribunal. It is by the test of a public examination, and by that alone, that the credit of a witness, both as to honesty and ability, can be thoroughly tried and appreciated. '*Namminus obstitisse videlur pudor inter paucos signatores*' is an ancient and a powerful observation in favor of oral testimony."

Starkie Ev., 9th ed., p. 866.

IV.

In criminal prosecutions the courts refuse to receive them.

In the case of Madam Restell, the abortionist, tried before the Supreme Court of New York in 1842, the only evidence to prove her guilt was depositions made by the victim, who had died before the trial, and her testimony taken *de bene esse*. But, although the depositions had been made in the presence of the prisoner, and she was told she might put any questions she chose to the witness, and notice of the taking of the deposition *de bene esse* was given to the defendant and her counsel, the Court held they were inadmissible as evidence, and reversed the judgment of conviction.

Judge Bronson says:

> "The great principle that the accuser and the accused must be brought *face to face*, and that the latter shall have the opportunity to cross-examine, can never be departed from with safety. Neither life nor liberty should ever be put in peril by listening to *ex parte depositions*. It is better that the guilty should sometimes go free than that the innocent should be subjected to such an ordeal." * * *
> "In our zeal to punish crime great care should be taken not to make precedents which may prove

> dangerous to the innocent, and it should never be forgotten that even the guilty have rights which should be scrupulously guarded."

People *v.* Restell (3 Hill, 289).

And so in State *v.* Berkley (*supra*) it was held that a statute which provided that if an adverse party will consent that the facts which the absent witness is expected to prove are true, such consent shall be taken as and for the testimony of such witness, and the trial shall not be postponed by reason of such absence, was unconstitutional and void, and in the opinion Justice Sherwood uses this forcible language:

> "From whence does the Legislature derive the power to deny the simple right conferred by the organic law, and, in lieu thereof, compel the accused to accept such a beggarly substitute as Section 1886 offers? * * * * But it may be urged that the Legislature has provided that the facts set forth in the affidavit shall be taken and received by the jury as the testimony of the absent witnesses. So it has; but all that a Legislature enacts does not necessarily pass for law. So, too, it might enact that a piece of palpable pot metal should be taken and received by a jury as genuine guinea gold, but I imagine that all the Legislatures in the land would not have sufficient power to make a common sense jury take and receive it. There is a limit to the power of the Legislature; there is a boundary over which it may not pass. It cannot make the impossible possible, nor, in defiance of the Bill of Rights, *compel the accused to accept a piece of paper instead of a man.*"

And in the case of the United States *v.* Angell (11 Federal Reporter, p. 34) the Circuit Court, speaking by Clark, District Judge, said:

> "I have found no case where the testimony of a witness, absent but living, given at a former trial, has been allowed to be proved at a subsequent trial. There are cases where the testimony of the witness in the preliminary examination has been allowed to be proved when the witness had died, but none where he had gone from the jurisdiction. And I think the law must be held to be that when the witness is living he must be produced or his testimony cannot be received in criminal cases, even if he be

beyond the jurisdiction of the Court, or of all the United States. The Constitution of the United States provides (amendments Article 6) that in all criminal prosecutions the accused shall enjoy the right to be confronted with the witnesses against him, and this without exception. Not if they can be produced, nor if they be within the jurisdiction, but absolutely and on all occasions. * * * Nor can it fairly be maintained that if the witness has once been confronted with the accused before the committing magistrate that the requirements or guarantees of the Constitution are answered. It is little better than an evasion of the matter to say that if the witness has been present at the preliminary examination, when the real question is whether the accused shall be held for the action of the grand jury, that, therefore, when he is indicted, and life, liberty or property are at stake, that right no longer exists. As well might it be said that if, in the complaint before the magistrate, the accused was informed of the nature and cause of the accusation, the subsequent indictment need not state the accusation again.

"The fair meaning of the Constitution is that wherever and whenever he is put on his final trial he shall be confronted with the witnesses against him if they are alive."

V.

The constitutional right of the defendants to be confronted with the witnesses against them is not secured by giving them notice of the execution of letters rogatory in France; and their failure to attend on such execution at a place 3,000 miles away from the place of trial, out of the district, and in a foreign country, does not operate as a waiver of their constitutional right, if it can be waived.

One of the principal advantages of a trial by jury is that the poor are entitled to the same privileges as the rich.

The reason why so much stress was laid on the provision that the trial should be "by an impartial jury of the State and District wherein the crimes shall have been committed" was to secure a fair trial at a small expense.

The debates in the State Conventions upon the Constitution show how solicitous the members were that a jury of the vicinage where the act was committed should be the

triers of the offense. They feared, unless such provision were made, a person accused might be dragged from his home and compelled to stand trial in a place where the attendance of witnesses and of counsel could be secured only at great expense.

To further secure the people from expensive litigation without probable cause, an indictment was required in all capital and infamous crimes.

In the Declaration of Rights of 1774 and the Non-Importation Agreement of the same year, one of the chief complaints was the attempt to deprive the American subjects, in many instances, of the right to a trial by jury, " by directing a new and illegal trial beyond the seas for " crimes alleged to have been committed in America."

See Hinsdale's Am. Govt., pp. 440–445.

For trivial and pretended offenses the colonists had been subjected to great expense, loss of time, and, in many instances, personal suffering, by reason of this illegal procedure, and for which, though acquitted, they were unable to obtain any kind of satisfaction or redress.

In this case the defendants are presumed to be innocent. The Government has not even granted them the privilege of an indictment on probable cause. On a simple, unverified complaint, the facts of which are alleged on information and belief only, the Government attempts to drag these defendants to the Republic of France if they would avail themselves of the inalienable right to be confronted with the witnesses against them.

To the Government, with its ample resources, the expense attendant upon the taking of testimony so far distant is of small consequence, but to the defendants it means much.

It involves the loss of their own time in going to, and returning from, Paris, as well as their expenses of travel.

It necessitates the expense of sending their own counsel retained by them for the defence of the action, and to whose services they are entitled as best able to protect their rights, and probably the retainer of foreign counsel familiar with the language and the practice of the courts of France as well.

And for what purpose?

Simply to aid the Government in an attempt to prove them guilty of the crime laid at their door, of which they themselves ~~know~~ know and the law presumes them innocent, and of which not even an indictment has been found against them.

And who is to compensate them for their loss if proved innocent?

Such proceedings would more than justify the alarms of the States that the mighty powers conceded to the Government might be used as a sword to destroy rather than as a shield to defend.

Moreover the constitutional right is to be confronted with the witnesses at the trial,

U. S. *v.* Angell (11 Fed. Rep., 34).

An examination taken before a foreign court which is not ultimately to try the offense does not satisfy the constitutional provision.

POINT THIRD.

THE CONSTITUTIONAL RIGHTS OF THE DEFENDANTS SHOULD NOT BE "FRITTERED AWAY" ON THE PLEA OF OVERRULING NECESSITY.

It has been the aim of this Brief to argue the question under discussion on the broad ground of the rights secured to the defendants by the Constitution.

If, as on the trial, the Government insists that on the decisions in this case rests the right to recover in many cases the penalties prescribed by the Statute for the violation of the Revenue Laws, then the Court should be the more careful not to dislodge a single stone "in the bulwark of personal liberty," so carefully laid by the framers of the Constitution.

> "The securities of individual rights * * *
> " cannot be too frequently declared nor in too many
> " forms of words, nor is it possible to guard too vig-
> " ilantly against the encroachment of power, nor
> " to watch with too lively a suspicion the propensity
> " of persons in authority to break through the cob-
> " web chains of paper constitutions."

2 Story Constitution, Sec. 1938.

This Court has too often been called upon to cement the stones loosened by a wedge driven by a maul too frequently in the hand of the Government to need awakening to the necessity of eternal vigilance.

One has but to read the words spoken by its judges to know it is a jealous guardian of the trust committed to it.

In the trial of Burr, Chief Justice Marshall, referring to the provisions under discussion, said:

> " The right given by this article must be deemed
> " sacred by the courts, and the article should be so
> " construed as to be something more than a dead
> " letter."

1 Burr's Trial, pp. 158–159.

And just after the country had passed through the dark days of the Civil War, this Court spoke out in words not to be mistaken as to the uselessness to urge the plea of overruling necessity as a ground for disregarding the rights of individuals assured to them by the Constitution, and in its opinion delivered the highest encomium on trial by jury which could be possibly given.

Mr. Justice Davis, speaking for the Court, said:

> "The Sixth Amendment guarantees the right of trial by jury in such manner and with such regulations that with upright judges, impartial juries and an able bar, the innocent will be saved and the guilty punished. It is in these words; 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and District wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature of the accusation; to be confronted with the witnesses against him; to have compulsory process for

obtaining witnesses in his favor; and to have the assistance of counsel for his defense.'

"These securities for personal liberty thus embodied were such as wisdom and experience had demonstrated to be necessary for the protection of those accused of crime.

"And so strong was the sense of the country of their importance, and so jealous were the people that these rights, highly prized, might be denied them by implication, that when the original Constitution was proposed for adoption, it encountered severe opposition, and but for the belief that it would be so amended as to embrace them, it would never have been ratified. Time has proven the discernment of our ancestors, for even these provisions, expressed in such plain English words that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than seventy years, sought to be evaded.

"Those great and good men foresaw that troublous times would arrive when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper, and that the principles of constitutional liberty would be imperilled unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers, and people equally in war and in peace, and covers with the shield of its protection all classes of men at all times, and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man, than that any of its provisions can be suspended during any of the great exigencies of Government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the Government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority. * * *

"All other persons, citizens of States where the courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury.

"This privilege is a vital principle, underlying the whole administration of criminal justice.

"It is not held by sufferance, and cannot be frittered away on any plea of State or political necessity.